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Supreme Court of the United States

OCTOBER TERM, 1963

No. 157

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R. B. PARDEN, ET AL, PETITIONERS,

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI FILED MAY 24, 1963

CERTIORARI GRANTED OCTOBER 14, 1963

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 157

R. B. PARDEN, ET AL., PETITIONERS,

vs.

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

Court of Appeals No. 19519

R. B. PARDEN,

versus

(C.A. #2551).

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al.,

R. B. PARDEN,

versus

(C.A. #2552).

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al.,

OTTO DRISKELL,

versus

(C.A. #2553).

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al.,

[fol. 2]

MRS. ELIZABETH W. WIGGINS, ETC., et al.,

versus

(C.A. #2588).

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al.,

AUBREY E. PRICE,

versus

(C.A. #2679).

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al.REQUEST THAT ONLY DESIGNATED PORTIONS OF RECORD  
BE PRINTED—Filed February 28, 1962

Pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Fifth Circuit, the appellants in these consolidated cases hereby request that only the following designated portions of the record be printed:

1. Complaints in all five cases.
2. Summonses and Marshal's returns as to service in all five cases.
3. Motion to Quash Return of Service of Summons or to Dismiss Action filed in Civil Action No. 2551, and affidavits of Hon. John Patterson, William J. Colley, Ralph P. Eager-ton and C. U. Irvine filed in support of said motion in Civil Action No. 2551.

[fol. 3] 4. In lieu of printing the motions to quash return of service of summons or to dismiss action filed in Civil Actions Numbered 2552, 2553, 2588 and 2679, and the affidavits filed in support of said motions, the following statement should be printed immediately following the last affidavit printed:

"In Civil Actions Numbered 2552, 2553, 2588 and 2679, Motions to Quash Return of Service of Summons or to Dis-

miss Action, and supporting affidavits of Hon. John Patterson, William J. Colley, Ralph P. Eagerton and C. U. Irvine were filed in form and content identical in all material respects to the motion and affidavits filed in Civil Action No. 2551.

5. Deposition of Earl M. McGowin, excluding the exhibits offered in connection therewith.

6. Deposition of C. U. Irvine, excluding the exhibits offered in connection therewith except those exhibits or portions thereof specified in Paragraph 7, hereof.

7. Exhibits offered in connection with the deposition of C. U. Irvine identified as Plaintiffs' Exhibits 1, 2 and 3; that portion of Plaintiffs' Exhibit 4 which is designated Paragraph Number 1308 commencing on page 48 and ending on page 49 of said Exhibit 4, which exhibit is a booklet entitled "Rules Governing Terminal Railway Employees".

8. Orders entered on the 29th day of December 1961, and the 22nd day of January, 1962, in Civil Action Number 2551.

[fol. 4] 9. In lieu of printing the orders entered on the 29th day of December, 1961 and the 22nd day of January, 1962, the following statement should be printed in the record immediately following the orders requested to be printed in Civil Action Number 2551:

"Orders identical to those entered on December 29, 1961 and January 22, 1962, in Civil Action Number 2551, were entered in Civil Actions Numbered 2552, 2553, 2588 and 2679."

10. Notice of Appeal filed in Civil Action Number 2551.

11. In lieu of printing the Notice of Appeal filed in Civil Actions Numbered 2552, 2553, 2588 and 2679, the following statement should be printed in the record immediately following the Notice of Appeal in Civil Action Number 2551:

"Notices of Appeal identical to that filed in Civil Action Number 2551 were filed in Civil Actions Numbered 2552, 2553, 2588 and 2679 on January 25, 1962."

12. Motion to Consolidate the five cases on appeal.



13. Order entered January 29, 1962, consolidating the cases on appeal.

14. Designation of Record on Appeal filed on January 31, 1962.

15. Order of the United States District Judge dated February 1, 1962, certifying original depositions of Mr. Earl M. McGowin and Mr. C. U. Irvine to the United States Court of Appeals for the Fifth Circuit.

[fol. 5] 16. This designation.

Al. G. Rives, T. M. Conway, Jr., Attorneys for Appellants.

Rives, Peterson, Pettus & Conway, Tenth Floor, Massey Building, Birmingham, Alabama, Of Counsel.

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF ALABAMA

R. B. PARDEN, Plaintiff,

versus

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on July 13, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, Defendants.

Civil Action File No. 2551

Suit for \$5,000.00 Damages For Personal Injuries Incurred While employed as Railroad Switchman for the Defendants by reason of Defendants' Negligence, in violation of Federal Safety Appliance Act.

[fol. 6]

**R. B. PARDEN** Plaintiff,

versus

**TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS,** whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on June 3, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, Defendant.

Civil Action File No. 2552

Suit Under Federal Employers' Liability Act For Personal Injuries in Amount of \$5,000.00.

**OTTO DRISKELL**, Plaintiff,

versus

**TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS,** whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on July 22, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, Defendants:

Civil Action No. 2553

Suit for \$5,000.00 Damages For Personal Injuries Incurred in Fall from Railroad Car, Under Federal Employers' Liability Act.

[fol. 7]

MRS. ELIZABETH W. WIGGINS and FRANK O. BURGE, JR., who sue in their capacity as Administrators of the Estate of John Ervin Wiggins, deceased, Plaintiffs,

versus

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiffs, but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on November 14, 1958 and whose true and correct name and legal status will be added by amendment to the plaintiff's complaint when ascertained, Defendants.

Civil Action File No. 2588

Suit for \$50,000.00 For Personal Injuries and Resulting Death of John Ervin Wiggins, Under Federal Employers Liability Act, Title 45, USCA, Sections 51 et seq. and Section 59.

AUBREY E. PRICE, Plaintiff,

versus

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiff, but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on October 2, 1959 and whose true and correct name and legal status will be added by amendment to the plaintiff's complaint when ascertained, Defendants.

[fol. 8] Civil Action File No. 2679

Suit for \$10,000.00 Personal Injuries On Account Of Negligence of Defendants. Brought under Federal Employers Liability Act and Federal Safety Appliance Acts or Hand Brake Act.

7

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

R. B. PARDEN, Plaintiff,

vs.

Civil Action No. 2551

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on July 13, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, Defendants.

COMPLAINT—Filed February 23, 1961

Comes the plaintiff in the above styled cause and brings this action against the defendants Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on July 13, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, and for cause of action against the said defendants, alleges as follows:

I.

1. That the plaintiff R. B. Parden is a resident and citizen of Mobile County in the State of Alabama, his address being 1005 Oak Street, Mobile, Alabama.

## II.

1. That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are common carriers by railroad and as such common carriers by railroad have at all times herein mentioned been engaged in the business of operating a railroad for the transportation of freight for hire in commerce between the several states of the United States of America and in foreign commerce.

2. (a) That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are the only departments within the Government of the State of Alabama which operate solely from the money they make themselves.

(b) That the said defendants get no legislative appropriation, and

(c) That the said defendants operate as a self-sustaining business, generating their own funds.

[fol. 10]

## III.

1. That the jurisdiction of the United States District Court for the Southern Division of the Southern District of Alabama is based upon (a) An Act of the Congress of the United States known as the Federal Employers Liability Act, Title 45, U.S.C.A. Section 51 et seq, and (b) Another Act of the Congress of the United States known as one of the Federal Safety Appliance Acts and generally referred to as the Automatic Coupler Act, namely, Title 45, U.S.C.A. Section 2.

## IV.

1. That the defendants as such common carriers by railroad as described in Paragraph II, 1 of this complaint and their employees have at all times herein mentioned been subject to (a) The provisions of the aforesaid Federal Employers Liability Act, and Act of the Congress of the United States enacted for the protection and benefit of employees of common carriers by railroad engaged in such



aforesaid interstate and foreign commerce who are injured or killed in line of duty and (b) The provisions of the aforesaid Federal Safety Appliance Act.

V.

First Cause of Action.

For plaintiff's first cause of action, plaintiff adopts the allegations of Paragraphs I, II, III and IV of this complaint and adds thereto the following allegations, viz:

[fol. 11] Plaintiff avers that on, to-wit, July 13, 1958 plaintiff was employed by the defendants as a railroad switchman at Mobile, Alabama and that a part of plaintiff's duties as such railroad switchman for the defendants was in furtherance of such aforesaid interstate or foreign commerce or directly or closely and substantially affected such commerce and that on said date while plaintiff and other members of a switching crew of the defendants were engaged in and about the switching of railroad cars at the Interchange Yard of the Alabama State Docks in Mobile County, Alabama and while plaintiff was running along beside moving railroad cars in an attempt to uncouple two of said moving railroad cars, plaintiff was caused to stumble over a guard rail and was caused to be injured and damaged as follows: Plaintiff's back was reinjured and he was injured internally and a previous condition was aggravated all to such extent that plaintiff was caused to be disabled and made sick and sore and caused to suffer great physical pain and mental anguish and was hospitalized and caused to undergo serious and painful medical care and treatment and he was caused to incur expense for hospitalization and medical care and treatment and for medicines and he lost wages from his employment as a railroad switchman and plaintiff's power and capacity to work and earn money was impaired; and plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the officers, agents or employees of the defendants while acting within the line and scope of their employment by the defendants or by reason of a defect or insufficiency due to the negligence of the defendants in their

cars, engines, track, roadbed, works, machinery, appliances or other equipment.

[fol. 12]

## VI.

### Second Cause of Action.

For plaintiff's second cause of action, plaintiff adopts the allegations of Paragraph V of this complaint, except that in lieu of the following allegations in said Paragraph V, viz:

"and plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the officers, agents or employees of the defendants while acting within the line and scope of their employment by the defendants or by reason of a defect or insufficiency due to the negligence of the defendants in their cars, engines, track, roadbed, works, machinery, appliances or other equipment."

plaintiff inserts the following allegations, viz:

"and plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the defendants' violating the aforesaid Federal Safety Appliance Act known as the Automatic Coupler Act, namely, Title 45, U.S.C.A. Section 2."

## VII.

Wherefore, plaintiff prays judgment against the defendants under each of the aforesaid causes of action in the amount of Five Thousand (\$5,000.00) Dollars.

[fol. 13]

## VIII.

Plaintiff demands a jury trial.

Rives, Peterson, Pettus & Conway, By Al G. Rives,  
Attorneys for Plaintiff.

Tenth Floor, Massey Building, Birmingham 3, Alabama,  
Telephone ALpine 1-3275.

Note to United States Marshal:

Summons and complaint in this action should be served on Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, etc. by leaving a copy thereof with the Honorable Earl M. McGowin, Director of the said Terminal Railway of the Alabama State Docks Department.

[fol. 14] IN UNITED STATES DISTRICT COURT  
Civil Action File No. 2551

R. B. -PARDEN, Plaintiff,

v.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, etc., Defendants.

SUMMONS—February 24, 1961

To the above named Defendants:

You are hereby summoned and required to serve upon Mr. AL. G. Rives, Attorney, Rives, Peterson, Pettus & Conway, plaintiff's attorney, whose address is: Tenth Floor, Massey Building, Birmingham 3, Alabama, an answer to the complaint which is herewith served upon you, within 20 (Twenty) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

William J. O'Connor, Clerk of Court, Minnie Pearl Cox, Deputy Clerk.

(Seal)

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

## [fol. 15]                      Return on Service of Writ.

I hereby certify and return, that on the 24th day of Feb. 1961, I received this summons and served it together with the complaint herein as follows: On February 24th, 1961, at Mobile, Ala. served copy of each on C. U. Irvine, General Manager of Operations, Terminal Railway of The Alabama State Docks Department; and Terminal Railway of Alabama State Docks, etc.

o J. L. May, United States Marshal.

By W. F. Armstrong, Deputy United States Marshal.

Marshal's Fees

Travel     \$ .40

Service     2.00

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2.40

Filed Feb. 27, 1961.

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IN UNITED STATES DISTRICT COURT

MOTION TO QUASH RETURN OF SERVICE OF SUMMONS OR  
TO DISMISS ACTION—Filed March 24, 1961

Comes now the Sovereign State of Alabama and appearing herein specially and solely for the purpose of making this motion and not otherwise submitting itself to the jurisdiction or processes of this Court moves the Court to dismiss the action or in lieu thereof to quash the return [fol. 16] of service of summons on the grounds:

1. The correct name of the defendant is the State of Alabama, a Sovereign State of the United States of America.

2. Terminal Railway Alabama State Docks is an agency of the Sovereign State of Alabama.

3. The Sovereign State of Alabama in operating the Terminal Railway Alabama State Docks is acting within a power reserved to the States under the Constitution of the United States.

4. This is an action sought to be commenced or prosecuted against the Sovereign State of Alabama by a citizen of a state.

5. The Sovereign State of Alabama has not consented to be sued and does not consent to be sued by the plaintiff.

6. The Sovereign State of Alabama has not waived its immunity to suit by the plaintiff.

7. Section 14 of the Constitution of the State of Alabama prohibits all officials of the State of Alabama and the legislature of the State of Alabama from subjecting the State of Alabama to suit as a defendant in any Court of law or equity.

8. The judicial power of the United States does not extend to controversies between a citizen of a state and state.

[fol. 17] 9. The judicial power of the United States does not extend to controversies between a citizen of the State of Alabama and the State of Alabama by virtue of Amendment XI to the Constitution of the United States.

10. This Court is without power to entertain this action or to issue process in this action.

11. This Court is without jurisdiction over the defendant or the subject matter of this suit.

12. The person upon whom service was attempted to be had by the marshal and to whom a copy of the summons and complaint was delivered, to-wit, C. U. Irvine, was not and is not an agent of the Sovereign State of Alabama upon which service could be effected.

Defendant requests oral argument.

Dated at Mobile, Alabama, this 23rd day of March, 1961.

MacDonald Gallion, As Attorney General of the State of Alabama.

Nicholas S. Hare, As Special Assistant Attorney General of the State of Alabama.

Of Counsel: Willis C. Darby, Jr., 307 First National Bank Building, Mobile, Alabama.



[fol. 18] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF C. U. IRVINE

I, C. U. Irvine, first being duly sworn do hereby depose and say:

1. I am an employee of the State of Alabama. I am employed at the State of Alabama's port facility, Alabama State Docks Department in Mobile, Alabama.

2. I make this affidavit in support of Motion to Quash Return of Service of Summons or to Dismiss Action.

3. I was employed by the State of Alabama as General Manager for Operations of the Alabama State Docks Department on February 24, 1961, when I was served with a copy of the Complaint and Summons in the above entitled cause. The position of General Manager for Operations was created by Act No. 604 of the Legislature of Alabama, Regular Session, Acts of Alabama, Page 863, Section 1, which provides:

Section 1. In addition to the position of General Manager heretofore authorized by law, there is hereby created within the State Docks Department the position of General Manager for Operations to be filled by appointment by the Director of State Docks. The General manager appointed shall serve at the pleasure of the Director, and his salary shall be \$10,000.00 per year, payable as other salaries in the State Docks Department are paid. His qualifications for the position shall include at least ten years' experience in port work in the field of administration and operation of docks. He shall be a man of good character, a legal resident [fol. 19] of Alabama, and shall have no financial interest in any type of facilities or property that the State Docks Department has acquired or may acquire or manage. He shall have no financial or personal interest in any business or enterprise of any kind with which the Department deals in the management of affairs or facilities under the control or jurisdiction of the Department.

4. I was not on February 24, 1961, and I am not now General Manager of Operations, Terminal Railway of the

Alabama State Docks Department or Terminal Railway of Alabama State Docks.

5. I was not on February 24, 1961, and am not authorized to accept service of process on behalf of the State of Alabama, The Terminal Railway Alabama State Docks, or any other Division of the State of Alabama.

C. U. Irvine.

Subscribed and sworn to before me this 29th day of September, 1961.

Willis C. Darby, Jr., Notary Public, State of Alabama at Large.

[fol. 20] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RALPH P. EAGERTON IN SUPPORT OF MOTION  
TO QUASH RETURN OF SERVICE OF SUMMONS OR TO  
DISMISS ACTIONS

State of Alabama,  
County of Montgomery.

Ralph P. Eagerton being first duly sworn deposes and says:

1. I am the Chief Examiner of the Department of Examiners of Public Accounts of the State of Alabama.
2. This affidavit is made in support of the motion of the Sovereign State of Alabama to quash return of service of summons or to dismiss action.
3. The duties of my office are set forth in the Code of Alabama, 1940, as amended, Title 55 Article 7.
4. The audits and examinations of the Department of Examiners of Public Accounts of the State of Alabama are made under my supervision and direction.
5. Audits and examinations of the books, records and accounts of the Alabama Beverage Control Board, a Division of the State of Alabama, are made by my department each year.

6. A statement showing the net profit of the operations of the Alabama Beverage Control Board for the fiscal years 1955 through 1960 is attached hereto, marked Exhibit A and made a part hereof.

[fol. 21] 7. The fiscal data set forth in Exhibit A hereof was compiled from records of the Department of Examiners of Public Accounts of the State of Alabama by employees of the State of Alabama acting under my supervision and direction.

Ralph P. Eagerton.

Subscribed and sworn to before me this 5th day of Oct., 1961.

Mabel Amos, State at Large.

EXHIBIT A TO AFFIDAVIT OF RALPH P. EAGERTON

Filed Oct. 9, 1951.

Statement of  
Net Profit of the  
Alabama Beverage Control Board  
For the Period of 1955 through 1960.

1954- 5 .....	\$8,678,329.40
1955- 6 .....	7,601,846.47
1956- 7 .....	8,466,750.64
1957- 8 .....	8,070,017.94
1958- 9 .....	8,398,528.76
1959-60 .....	8,044,517.81

[fol. 22] **IN UNITED STATES DISTRICT COURT**

**AFFIDAVIT OF WILLIAM J. COLLEY IN SUPPORT OF MOTION TO  
QUASH RETURN OF SERVICE OF SUMMONS OR TO  
DISMISS ACTION**

State of Alabama,  
County of Mobile.

William J. Colley being first duly sworn deposes and says:

1. I am the Secretary-Treasurer of the Alabama State Docks Department, an Agency of the State of Alabama, and reside in the City of Mobile, State of Alabama.

2. This affidavit is made in support of the motion of the Sovereign State of Alabama to quash return of service of summons or to dismiss action.

3. The duties of my office are set forth in the Code of Alabama, 1940; Pocket Part, Title 38, Section 1(15) which provides:

**Secretary-Treasurer; Monthly Report of Director.**—The secretary-treasurer shall receive and disburse for the department, under the supervision of the director, all monies which the department is authorized to receive and disburse. He shall be responsible for the safekeeping thereof and shall properly account therefor. The director shall make a monthly report to the governor of his acts and doings.

4. The bookkeeping, accounting, reporting systems, procedures, records and accounting forms of the Alabama State Docks Department are prepared and formulated by the Department of Examiners of Public Accounts of the State of Alabama pursuant to Title 55, Article 7, Code of Alabama:

[fol. 23] 5. All monies received by the Alabama State Docks Department are the property of the State of Alabama. All monies expended by the Alabama State Docks Department are expended in accordance with the laws of the State of Alabama.

6. The Department of Examiners of Public Accounts audits and examines the books, records, vouchers and ac-

counts of the Alabama State Docks Department continuously and makes a formal audit report of the Alabama State Docks Department at least once in every period of two years pursuant to Title 55, Article 7, Code of Alabama.

7. The Department of Examiners of Public Accounts is in charge of a Chief Examiner who is appointed by, supervised and controlled by a joint legislative committee of the House of Representatives and Senate of the State of Alabama pursuant to Title 55, Article 7, Code of Alabama.

8. I am in charge of the accounting and auditing division of the Alabama State Docks Department. Periodic financial statements of each operating unit of the maritime and railroad facilities of the State of Alabama are prepared by employees of the State of Alabama in Mobile, Alabama, under my supervision and direction. The financial records of the operations of the facilities comprising the Alabama State Docks Department from the inception of operations in 1928 to the present time are kept in my office under my supervision.

9. A statement showing the net profit and loss of the Alabama State Docks Department from the inception of operations in 1928 through September 30, 1960, is attached [fol. 24] hereto, marked Exhibit A and made a part hereof.

10. A statement showing the net profit and loss of the facilities of the State of Alabama in Mobile known as the Terminal Railway Alabama State Docks from the inception of operations in 1928 through December 31, 1960, is attached hereto, marked Exhibit B and made a part hereof.

11. A statement showing the interest and principal on the Harbor Improvement Bonds issued by the State of Alabama pursuant to Amendment XII of the Constitution of the State of Alabama and laws of the State of Alabama paid by the State Treasurer from the general funds of the State of Alabama and not reimbursed by earnings of the Alabama State Docks Department from the inception of operations of the harbor facilities of the State of Alabama to September 30, 1958, is attached hereto, marked Exhibit C and made a part hereof.

12. In 1953 pursuant to a request of the Finance Director of the State of Alabama, and a resolution by the Alabama



State Docks Board of the State of Alabama, the Treasurer of the Alabama State Docks paid the State Treasury the sum of \$400,000.00.

13. The Legislature of the State of Alabama periodically appropriates funds from the Alabama State Docks account to the State Personnel Board. A statement of the funds paid by the Treasurer, Alabama State Docks Department to the State Personnel Board pursuant to the direction of the Legislature of the State of Alabama is attached hereto, marked Exhibit D and made a part hereof.

[fol. 25] 14. A statement showing the interest on Inland Waterway Improvement Bonds issued by the State of Alabama pursuant to Amendment LVIII of the Constitution of the State of Alabama and laws of the State of Alabama paid by the Treasury of the State of Alabama from the general funds of the State of Alabama and not repaid by earnings of the Alabama State Docks Department is attached hereto, marked Exhibit E and made a part hereof.

15. Proceeds of the original Harbor Improvement Bonds issued by the State of Alabama were used to construct the following operating units of the State's facilities in Mobile:

Wharves and warehouses .....	\$ 5,678,139.04
Cotton Warehouse .....	612,059.13
Terminal Railway .....	1,969,635.01
Bulk Material Handling Plant .....	956,117.61
Industrial lands .....	784,049.21

\$10,000,000.00

16. All of the Exhibits and other financial data set forth in this affidavit were compiled from records of the office of the Secretary-Treasurer of the Alabama State Docks Department by employees of the State of Alabama acting under my supervision and direction.

William J. Colley

Subscribed and sworn to before me this 6th day of October, 1961.

F. Guyton Allums, Notary Public.

[fol. 26]

## EXHIBIT A TO AFFIDAVIT OF WILLIAM J. COLLEY

Statement of  
Profit and (Loss)  
Alabama State Docks Department  
(An Agency of the State of Alabama)  
January 1, 1928 through  
September 30, 1960.

Jan. 1, 1928 through Dec. 31, 1929	\$184,980.13*
Calendar Year— 1930	(169,311.08)*
Calendar Year— 1931	( 79,804.77)*
Calendar Year— 1932	(191,343.24)*
Calendar Year— 1933	(148,892.75)*
Calendar Year— 1934	(178,852.17)*
Jan. 1, 1935 through Sept. 30, 1935	(234,318.93)*
Fiscal Year— 1936	( 69,565.23)*
Fiscal Year— 1937	44,884.21
Fiscal Year— 1938	114,000.21
Fiscal Year— 1939	131,146.53
Fiscal Year— 1940	76,510.83
Fiscal Year— 1941	( 14,529.63)
Fiscal Year— 1942	278,979.54
Fiscal Year— 1943	567,326.06
Fiscal Year— 1944	514,872.15
Fiscal Year— 1945	797,157.44
Fiscal Year— 1946	827,005.89
Fiscal Year— 1947	1,266,862.86
Fiscal Year— 1948	1,141,151.70
Fiscal Year— 1949	455,425.43
Fiscal Year— 1950*	377,607.31
Fiscal Year— 1951	281,957.37
Fiscal Year— 1952	696,537.42
Fiscal Year— 1953	927,888.38
Fiscal Year— 1954	1,012,338.95
Fiscal Year— 1955	730,517.12
Fiscal Year— 1956	1,090,082.63
Fiscal Year— 1957	813,378.50
Fiscal Year— 1958	(269,763.31)
Fiscal Year— 1959	788,530.79
Fiscal Year— 1960	470,315.71

\* Before Depreciation.

[fol. 27]

## EXHIBIT B TO AFFIDAVIT OF WILLIAM J. COLLEY

Statement of  
Profit and (Loss)Terminal Railway Alabama State Docks  
(an Agency of the State of Alabama)

December 1, 1927 through December 31, 1960.

Year	Operating Profit	Less Interest Allocation*	Net Profit After Interest Allocation
Dec., 1927	2,441.58	—	2,441.58
1928	12,325.29	—	12,325.29
1929	22,597.93	67,200.74	( 44,602.81)
1930	37,613.79	84,217.50	( 46,603.71)
1931	18,858.86	84,217.50	( 65,358.64)
1932	17,890.11	84,217.50	( 66,327.39)
1933	55,590.73	84,112.84	( 28,522.11)
1934	41,103.28	83,903.53	( 42,800.25)
1935	62,316.87	83,367.94	( 21,051.07)
1936	77,070.37	82,727.69	( 5,657.32)
1937	64,055.00	81,668.81	( 17,613.81)

\* Note—Interest Allocations on a fiscal year basis—Oct.  
1 through Sept. 30.

[fol. 28]

Year	Operating Profit	Less Interest Allocation*	Net Profit After Interest Allocation
1938	75,079.00	79,877.34	( 4,798.34)
1939	89,840.00	77,771.91	12,068.09
1940	105,240.00	75,666.47	29,573.53
1941	116,998.00	73,561.03	43,436.97
1942	153,973.00	71,455.59	82,517.41
1943	140,663.00	69,350.16	71,312.84
1944	98,295.00	67,244.72	31,050.28
1945	113,513.00	65,139.28	48,373.72
1946	62,600.00	63,033.84	( 433.84)
1947	237,150.00	60,928.41	176,221.59
1948	199,443.00	58,822.97	140,620.03
1949	83,596.00	56,717.53	26,878.47
1950	83,932.00	54,612.09	29,319.91
1951	125,758.00	52,506.66	73,251.34
1952	213,961.00	50,401.22	163,559.78
1953	343,012.00	48,295.78	294,716.22
1954	203,236.00	46,190.34	157,045.66
1955	215,724.00	44,084.91	171,639.09
1956	293,730.00	41,979.47	161,750.53
1957	30,242.00	39,874.03	( 9,632.03)
1958	(105,341.00)	37,768.60	(143,109.60)
1959	66,755.00	35,663.16	31,091.84
1960	33,811.00	33,557.72	253.28

[fol. 29]

## EXHIBIT C TO AFFIDAVIT OF WILLIAM J. COLLEY

Statement of Interest and Principal  
on Harbor Improvement Bonds  
Issued by the State of Alabama  
Pursuant to Amendment XII of the  
Alabama Constitution not Reimbursed  
for the Period 1927 through  
September 30, 1958:

Fiscal Year	Interest	Fiscal Year	Principal
1927	21,250.00	1933	25,000.00
1928	—	1934	50,000.00
1929	269,120.53	1935	75,000.00
1930	243,625.00	1936	100,000.00
1931	173,687.50	1937	175,000.00
1932	200,000.00	1938	250,000.00
1933	184,125.00	1939	250,000.00
1934	150,375.00	1940	250,000.00
1935	168,562.50	1941	250,000.00
1936	—	1942	250,000.00
1937	—	1943	125,000.00
1938	—	1944	250,000.00
1958	9,562.50	1945	250,000.00
		1946	250,000.00
		1947	250,000.00
		1948	250,000.00
		1949	250,000.00
		1950	250,000.00
		1951	250,000.00
		1958	125,000.00
Totals	<u>\$1,420,308.03</u>		<u>\$3,925,000.00</u>



[fol. 30]

## EXHIBIT D TO AFFIDAVIT OF WILLIAM J. COLLEY

Statement of Payments by  
Alabama State Docks Department  
(an Agency of the State of Alabama)  
to the State Personnel Board  
1954 through 1960.

1954 .....	\$ 2,799.56
1955 .....	2,306.96
1956 .....	4,961.93
1957 .....	5,345.00
1958 .....	8,009.00
1959 .....	9,178.00
1960 .....	2,202.00
	<u>\$34,802.45</u>

## EXHIBIT E TO AFFIDAVIT OF WILLIAM J. COLLEY

Statement of Interest on  
Inland Waterway Improvement Bonds  
Issued by the State of Alabama  
Pursuant to Amendment LVIII of the  
Alabama Constitution not Repaid  
for the period 1958 through 1960.

1958 .....	\$ 48,519.35
1959 .....	97,018.75
1960 .....	97,018.75
	<u>\$242,556.85</u>

Filed Oct. 9, 1961.

## [fol. 31] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HONORABLE JOHN PATTERSON, GOVERNOR OF THE  
STATE OF ALABAMA IN SUPPORT OF MOTION TO QUASH RE-  
TURN OF SERVICE OF SUMMONS OR TO DISMISS ACTION

State of Alabama,  
County of Montgomery.

I, John Patterson, first being duly sworn do hereby de-  
pose and say:

1. I am the Governor of the State of Alabama.
2. This affidavit is made in support of the motion of  
the Sovereign State of Alabama to quash return of service  
of summons or to dismiss action.

3. The Alabama State Docks Department is an execu-  
tive department of the State of Alabama. The director of  
the Alabama State Docks Department is appointed by me  
as Governor with the advice and consent of the Senate of  
the State of Alabama. The director serves at my pleasure.  
The director of the Alabama State Docks Department is a  
member of my cabinet.

4. The Legislature of the State of Alabama meets bi-  
annually. I, my staff and advisors met frequently in 1959  
and in 1961 and prepared a comprehensive legislative pro-  
gram pertaining to the State's maritime and inland water-  
way facilities operated by the Alabama State Docks De-  
partment. I, and my staff met with members of the House  
and Senate of the State of Alabama in connection with bills  
involving the State's maritime facilities.

[fol. 32] 5. During my administration the Legislature of  
the State of Alabama has authorized the State to borrow  
and spend the sum of seven and one-half million dollars on  
improvements and additions to the State's facilities oper-  
ated by the Alabama State Docks Department. The Legisla-  
ture also passed laws placing additional employees of the  
State employed at the Alabama State Docks Department  
under state civil service, increasing the maximum pay for  
the Director of the Department and creating new positions  
in the Department.

6. In my capacity as Governor, I regularly confer with the Director of the Alabama State Docks Department with respect to matters affecting the State as a whole and particularly with respect to the operation, maintenance, expansion and financing of the State's river and sea port facilities. By the statute, I, as Governor, am charged with the duty of making all final decisions with respect to the expansion of the State's port facilities and the financing thereof.

7. I, as Governor, am responsible to the people of the State of Alabama for the operation of the Alabama State Docks Department.

John Patterson.

Subscribed and sworn to before me this 10th day of Oct. 1961.

Mabel Amos, Notary Public, State at Large.

Filed Oct. 17, 1961.

[fol. 33] Recitation:

"In Civil Actions Numbered 2552, 2553, 2588 and 2679, Motions to Quash Return of Service of Summons or to Dismiss Action, and supporting affidavits of Hon. John Patterson, William J. Colley, Ralph P. Eagerton and C. U. Irvine were filed in form and content identical in all material respects to the motion and affidavits filed in Civil Action No. 2551.

IN UNITED STATES DISTRICT COURT  
Civil Action No. 2551

R. B. PARDEN, Plaintiff,

vs.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama, on July 13, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained.

DEPOSITION

Deposition of Mr. Earl M. McGowin, taken in the offices of the witness at Alabama State Docks Department, Mobile, Alabama, on October 26, 1961, commenting at approximately 5:15 o'clock P.M.

[fol. 34]

IN UNITED STATES DISTRICT COURT

Civil Action No. 2552

R. B. PARDEN, Plaintiff,

vs.

TERMINAL RAILWAY, etc., Defendant.

Civil Action No. 2553

OTTO DRISKELL, Plaintiff,

vs.

TERMINAL RAILWAY, etc., Defendant.

Civil Action No. 2679  
AUBREY E. PRICE, Plaintiff,

vs.

TERMINAL RAILWAY, etc., Defendant.

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Civil Action No. 2588

Mrs. Elizabeth W. Wiggins and Frank O. Burge, Jr., who  
sue in their capacity as Administrators of the Estate  
of John Ervin Wiggins, Deceased, Plaintiffs,

vs.

TERMINAL RAILWAY, etc., Defendant.

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APPEARANCES:

For Plaintiffs: Al G. Rives, Esq., and T. M. Conway,  
Jr., Esq., of Messrs. Rives, Peterson, Pettus & Conway,  
10th Floor, Massey Building, Birmingham 3, Alabama.

For Defendants: Nicholas S. Hare, Esq. Of Counsel:  
Willis C. Darby, Esq.

[fol. 35]

Stipulation

It is hereby stipulated by and between the parties that  
the reading over and signing of this deposition to or by  
the witness be and hereby are waived.

---

Mr. EARL M. McGOWIN, having been first sworn to speak  
the truth, the whole truth, and nothing but the truth, testi-  
fied as follows:

Direct examination.

By Mr. Rives:

Q. This is Mr. Earl M. McGowin?

A. Right.

Q. Mr. McGowin, do you have an official connection with  
the Alabama State Docks Department?

A. I am the Director.



Q. During what period of time have you been Director of the Alabama State Docks Department?

A. From January, 1959, to date.

Q. Is there a Terminal Railway of the Alabama State Docks Department?

A. Yes.

Q. Has there been a Terminal Railway of the Alabama State Docks Department continuously during the time you have been a Director of the Alabama State Docks Department?

A. Yes.

Q. Is Mr. C. U. Irvine General Manager of Operations of the Alabama State Docks Department?

A. Yes.

Q. During what period of time has he held that position?

[fol. 36] Mr. Hare: Let me interrupt right there. That gets to be a legal question by statute, and as to dates, we would have to help him, I expect, because it was changed back and forth in this Legislature.

Q. Well, can you elaborate any on Mr. Hare's remarks, Mr. McGowin, regarding the position of General Manager of the Operations of Alabama State Docks Department?

A. Other than to say he has been General Manager of our Operations ever since I have been here.

Q. Does he hold that position under your appointment?

A. No, he had that position when I came here. I believe originally it was by merit system appointment, and this is elaborating on what Mr. Hare said. The Legislature of, I believe, 1951.

Mr. Hare: Of 1956.

A. Maybe it was 1956—set up the—by statute a General Manager of Operations and a General Manager for Sales. The recent Legislature removed them and they are back under the merit system. I believe that is it.

Q. Isn't the position of General Manager of Operations of the Alabama State Docks Department filled by an appointment of the Director of the Alabama State Docks Department?

A. During that period—it is my understanding that during that period it was held by statute; that place was filled

by action of the Director, but Mr. Irvine was Director when I came, and I did not change.

[fol. 37] Q. Did the United States Marshal bring you the summons and complaint, that is, the Court papers in these cases of R. B. Parden, Otto Driskell, Mrs. Elizabeth Wiggins, et al., and Aubrey Price as Director of the Alabama State Docks Department?

A. I was served in only one instance, and that was this week, a subpoena.

Q. That was a subpoena, but prior to that had the United States Marshal come to you with any papers in these cases at all?

A. No.

Q. We, as attorneys of record for the respective plaintiffs in these cases, had directed in writing that the United States Marshal serve these papers on you as Director of Alabama State Docks Department. Do you know why he served them on Mr. C. U. Irvine, General Manager of the Alabama State Docks Department, rather than on you as Director?

A. I have no idea.

Q. You had no contact or discussion with the United States Marshal?

A. None whatever.

Q. Now, Mr. McGowin, will you examine this newspaper article that I am going to ask the deposition commissioner to mark as Exhibit 1 for identification?

(The reporter marked the document Exhibit No. 1 for identification to the deposition of Earl M. McGowin.)

Q. You may read this if you would like.

Mr. Hare: After you read it we would like to read it before you answer the question.

[fol. 38] (The document was then read by both the witness and Messrs. Hare and Darby.)

Q. Now, Mr. McGowin, you have examined Exhibit 1 for identification to your deposition. Have you previously seen that newspaper article or one like it?

A. Yes, I seem to recall seeing that at the time it was published.

Q. Were you interviewed by Mr. James E. Jacobson, news staff writer?

A. Yes.

Q. Was news writer James E. Jacobson quoting you when he wrote as follows: "The State Docks is also the only department within the state government which operates solely from the money it makes itself"?

A. Whether that was a direct quotation I can't recall. You understand in these interviews how they are done? You talk very glibly and very fast and he puts it together.

Q. Well, is that substantially a correct statement of fact in that article, the first sentence?

Mr. Hare: May I ask the attorney if he means a statement of fact as it is or a statement of fact as then stated?

Mr. Rives: As he—

A. Well, certainly, currently—

Mr. Hare: You were going to modify your question to make it clear what you mean?

[fol. 39] Q. Well, as Director of the Alabama State Docks Department, would you say that that is or is not a correct statement, that, "The State Docks is also the only department within the state government which operates solely from the money it makes itself"?

A. Well, I think what I was trying to say there was that we do not get a current legislative appropriation for operating purposes. Of course, you understand, the whole thing was started with public money. The State sold \$10,000,000 of Harbor Bonds originally, and since they are general obligation bonds of the State, in the event this department does not generate enough funds over and above operating expenses to pay those interest and principal payments, the general fund of the State is obliged to pick them up.

Q. Well, now, was News Writer James E. Jacobson quoting you when he made this statement in this article: "The Docks get no legislative appropriation"?

A. Yes, apparently that is right. At that time, now mind you, I think probably we were talking primarily about the Mobile operation and current appropriations. We do get an appropriation to defer the interest and principal payments on these Inland Docks bonds. That is a continuing appropriation. That has been done, however, since that interview, but—although the State was doing it on a year to year basis at the time.

Q. Well, was News Writer James E. Jacobson quoting you when he writes in this article as follows: "It (referring to the Alabama State Docks Department) operates as a self-sustaining business generating its own funds"?

A. Well, certainly, insofar as we can, but we have got the cushion of the State behind us.

Q. Well, this News Writer James E. Jacobson did have an interview with you and apparently this article that he [fol. 40] wrote was based on information that he obtained from you as Director of the Alabama State Docks Department?

A. That is correct.

Mr. Rives: We offer this as Exhibit 1 to the deposition of the witness McGowin.

Q. Does the Alabama State Docks Department operate from an accounting standpoint on a quarterly basis?

A. Actually, all operations are on an annual basis, but it has been our practice ever since I have been here, and I believe from the beginning of the Docks, to provide—to make monthly operating statements. I have adopted the policy since I have been here of publishing them only quarterly, but we do get a monthly operating statement, yes.

Q. Well, has the Alabama State Docks Department operated at a profit during the first three quarters of 1961?

A. Yes.

Q. Do you know about what that operating profit was during the first three quarters of 1961?

A. After interest and depreciation it was something in the neighborhood of \$700,000. I can tell you, though, that the operating—that the fourth quarter we operated at a very sizeable loss, which will reduce that figure.

Q. Well, as a matter of fact, Mr. McGowin, the Alabama State Docks Department has operated at a profit each year during the period that you have been Director of the Alabama State Docks Department, has it not?

A. Yes.

[fol. 41] Mr. Rives: I believe that is all.

Mr. Hare: No questions on our part.

Mr. Rives: Wait just a moment, please.

Q. Mr. McGowin, you have testified on direct examination that there is a Terminal Railway of the Alabama State Docks Department, and I would like to ask who is in charge of the Terminal Railway of the Alabama State Docks Department?

A. Well, basically, I am.

Q. Next to you, who is in charge of the operations of the Terminal Railway of the Alabama State Docks?

A. Mr. Irvine, as General Manager of our Operations, has the direction of the Terminal Railway under his own supervision along with all the other divisions of our Operations. I believe Mr. Wallace is the Terminal Railway Superintendent.

Q. But is Mr. Irvine as General Manager of the Alabama State Docks Department also General Manager of the Terminal Railway of the Alabama State Docks Department?

A. That is his responsibility, yes.

Q. And then under Mr. Irvine as General Manager of the Terminal Railway of the Alabama State Docks Department is a man named Anthony Wallace, who is Superintendent and General Yard Master?

A. His title, I believe, is General Railway Superintendent.

[fol. 42] Mr. Rives: There are other questions I could ask you, Mr. McGowin, but I believe you would prefer that I ask these questions of Mr. Irvine and Mr. Wallace, and I won't take any more of your time.

Mr. McGowin: Thank you.



## IN UNITED STATES DISTRICT COURT

Civil Action No. 2551

R. B. PARDEN, Plaintiff,

vs.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama, on July 13, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, Defendants.

## DEPOSITION

Deposition of Mr. C. U. Irvine, taken in the offices of Willis C. Darby, Jr., Esq., 307 First National Bank Building, Mobile, Alabama, on October 27, 1961, commencing at approximately 8:05 A.M.

[fol. 43]

## IN UNITED STATES DISTRICT COURT

Civil Action No. 2552

R. B. PARDEN, Plaintiff,

vs.

TERMINAL RAILWAY, etc., Defendant.

Civil Action No. 2553

OTTO DRISKELL, Plaintiff,

vs.

TERMINAL RAILWAY, etc., Defendant.

Civil Action No. 2679

AUBREY E. PRICE, Plaintiff,

vs.

TERMINAL RAILWAY, etc., Defendant.

Civil Action No. 2588

MRS. ELIZABETH W. WIGGINS and FRANK O. BURGE, JR., who  
sue in their capacity as Administrators of the Estate of  
John Ervin Wiggins, Deceased, Plaintiffs,

vs.

TERMINAL RAILWAY, etc., Defendant.

Appearances:

For Plaintiffs: Al G. Rives, Esq., and T. M. Conway,  
Jr., Esq., of Messrs. Rives, Peterson, Pettus & Conway,  
10th Floor, Massey Building, Birmingham 3, Alabama.

For Defendants: Nicholas S. Hare, Esq. Of Counsel:  
Willis C. Darby, Esq.

Stipulation.

It is hereby stipulated by and between the parties that the  
reading over and signing of this deposition to or by the  
witness be and hereby are waived.

[fol. 44] MR. C. U. IRVINE, having been first sworn to speak  
the truth, the whole truth, and nothing but the truth, tes-  
tified as follows:

Direct examination.

By Mr. Rives:

Q. This is Mr. C. U. Irvine?

A. Yes, sir.

Q. Mr. Irvine, do you have an official connection with the  
Alabama State Docks Department at Mobile?

A. Yes, sir.

Q. What is your official position with the Alabama State Docks Department in Mobile?

A. General Manager, Alabama State Docks.

Q. During what period of time and in what capacities have you been employed by or connected with the Alabama State Docks Department?

A. I commenced work in 1926 as an engineer on the—during the period of construction under General Sibert. In 1928 I was appointed Superintendent of the Bulk Handling Plant, and some years later, in 1937 or 1938, a Resident Engineer status for various construction work in addition to the supervision of the Bulk Handling Plant, and later—I don't recall the years—I was appointed Engineer, and at the same time maintained the other—supervision of the Bulk Plant, and in the status of Engineer of the Docks we had a modest administrative group; and—when was it? In 1957? Mr. MacFarland was the Director—the Legislature passed a law to permit the appointment of the General Manager of Operations, and since that time I have been General Manager of Operations.

Q. Does your position as General Manager of Operations of the Alabama State Docks Department include the Terminal [fol. 45] Railway of the Alabama State Docks Department?

A. Yes, sir.

Q. Then you are General Manager of Operations of the Terminal Railway of the Alabama State Docks Department?

A. Of all departments. I would say the Docks Department, the Cold Storage Plant, the Grain Elevator, the Bulk Handling Plant, and the Terminal Railway.

Q. Now did the United States Marshal serve you as General Manager of the Alabama State Docks Department or as General Manager of the Terminal Railway of the Alabama State Docks Department with the summons and complaints, that is, the Court process in these cases of Par-den and Driskell and Wiggins and Price?

A. Yes, sir.

Q. When was the Terminal Railway of the Alabama State Docks Department constructed?

A. Well, the Terminal Railway was first as a construction railroad. I don't know the date that the certificate of convenience was issued, but in the neighborhood of 1925 or 1926.

Q. How many miles of trackage does the Terminal Railway of the Alabama State Docks Department possess?

A. Well, 50 miles, more or less. That is all the tracks.

Q. Now that includes all industrial tracks and the main line?

A. Owned by the State Docks.

Q. The trackage of approximately 50 miles is primarily industrial tracks except that the railroad does have a main line track extending from the main yard down to the Chickasaw area, does it not?

[fol. 46] A. That is right. I think there is about six miles altogether.

Q. About six miles of main line track?

A. What we call main line track.

Q. Now with reference to that main line track, is it used by any other railroads other than the Terminal Railway of the Alabama State Docks Department?

A. Yes, sir.

Q. What other railroads use that main line track?

A. It is used by the Southern and A. T. & N.

Q. That is the Alabama, Tennessee and Northern Railroad Company and the Southern Railway Company?

A. Yes. Now they have restricted districts. The Southern Railroad operates only between the Southern Railroad crossing and the Southern Kraft Plant.

Q. How many miles are involved there?

A. Oh, one mile, I guess; and the A. T. & N. has through train running rights between Sibert Junction or right close to the Southern Railroad crossing into their yard on the—over on the Industrial Canal. Now all railroads have running rights over a short section of the main line, maybe 1,000 feet long, and their connections to deliver and pick up cars at the interchange.

Q. Now when you refer to all the railroads, what other railroads are involved, Mr. Irvine?

A. The L. & N. and the G. M. & O.

Q. That is the Louisville and Nashville Railroad Company and the Gulf, Mobile and Ohio Railroad?

A. Yes, sir.

Q. Now, Mr. Irvine, is it true that the Terminal Railway of the Alabama State Docks Department serves the Docks as well as several large industries that are located either on state property or property near state property?

A. Yes, sir.

[fol. 47] Q. You were subpoenaed to bring a map of the trackage of the Terminal Railway of the Alabama State Docks Department and also the trackage used by the Terminal Railway. Did you bring such a map?

A. Yes, sir. I would have to say we do not have a complete map, but—this is an old map. We haven't an up-to-date map.

Mr. Rives: We would like for the deposition commissioner to identify these maps as Exhibits 1 and 2 to the deposition of the witness Irvine.

A. This is an addition, now. We had to make it over.

Q. He is taking down what you say, Mr. Irvine. Which one would come first?

A. Both maps would have to go together.

Q. We are going to have one of the maps marked Exhibit 1 to your deposition and the other one Exhibit 2 to your deposition. Now which would be the first one?

A. This one.

(The reporter marked the maps as instructed.)

A. And then Map No. 1 would show principally the trackage south of Beauregard Street, which has been laid since 1958, and then Map No. 2 would show the north extension to Chickasaw.

Q. In other words, the main line of the Terminal Railway of the Alabama State Docks Department would run from the area shown in Exhibit 1 to the area shown to the right-hand edge of Exhibit No. 2?

A. Yes.

Q. Now, Mr. Irvine, will you look at this rough pencil diagram and state whether or not that roughly shows the



[fol. 48] trackage of the Terminal Railway of the Alabama State Docks Department and the approximate location of the various industries on the tracks or that are served by the Terminal Railway? That doesn't purport to be a correct map, but does it roughly show the layout of the tracks?

A. It is a very good showing of the layout of the tracks except that the part south of Beauregard Street, which is the track serving the new piers, are not shown.

Mr. Rives: All right, we ask the commissioner to mark this Exhibit 3 to the deposition of the witness Irvine.

(The reporter marked the document as requested.)

Q. Now this Exhibit 3 shows an interchange yard. Does the Terminal Railway of the Alabama State Docks Department have a joint interchange yard at a location as shown on this map?

A. Yes, sir.

Q. I will ask you, Mr. Irvine, if the Louisville and Nashville Railroad Company and the Gulf, Mobile and Ohio Railroad Company and the Southern Railway Company and the Alabama, Tennessee and Northern Railway Company run their locomotives into that joint interchange yard in delivering cuts of cars to the Terminal Railway of the Alabama State Docks Department and in taking delivery of cars from the Terminal Railway of the Alabama State Docks Department?

A. Yes, sir.

Q. Well, now, I will ask you if on occasions these several railroads that I have just named would bring railroad cars to that joint interchange yard loaded with merchandise, and if the switch engines of the Terminal Railway of the [fol. 49] Alabama State Docks Department would classify those cars by switching operations and then take such loaded cars to various industries such as are shown on this Exhibit 3 to your deposition, the Gulf Shipyards or the American Cyanamid Company, or the International Paper Company or the Scott Paper Company or the Bemis Bag Company to be unloaded by those industries that I have just named.

A. Yes, sir.

Q. And I will ask you if, from time to time, the Terminal Railway of the Alabama State Docks Department would pick up loaded cars at these various industries that I have just named, such as Bemis Bag Company, Scott Paper Company, International Paper Company, American Cyanamid Company, Gulf Shipyard, Brickcrete Company, Alabama Power Company, and take those loaded cars and deliver them to either the Alabama, Tennessee and Northern Railroad Company or the Louisville & Nashville Railroad Company or the Southern Railway Company or the Gulf, Mobile & Ohio Railroad Company.

A. They delivered them to the interchange yard on a designated track, which would be the proper railroad to receive those cars.

Q. All right, sir, and then the engines of whichever railroad was involved would take those cars and move them on to points throughout the United States?

A. Yes, sir.

Q. And in many instances those loaded cars coming from these other railroads that I have just mentioned into this joint interchange yard and being delivered to these industries that I have just mentioned and loaded cars from these industries I have mentioned back to the joint interchange yard and delivered to these other railroads that I have just mentioned for transportation to other points in the United States would never go down onto the docks and be handled by any ship. Is that right?

[fol. 50] A. There might be an occasional exception, but generally the interchange is direct. It is not through the Docks. There may be a partially loaded car go to the Docks, but—

Q. Well, I mean, for example, the Louisville & Nashville Railroad Company would deliver a cut of 10 carloads of pulpwood for delivery to the International Paper Company. Those cars of pulpwood would come into your interchange yard by the L. & N. Railroad Company and would be picked up by the Terminal Railway of the Alabama State Docks Department and delivered to the International Paper Company and would never go down on the docks, would they?

A. Not on the docks, no. They would go into a classification yard on the east side of the L. & N. Railroad, but they would not go down on the docks.

Q. Well, they would go into the classification yard down on the east side of the L. & N. Railroad because of the fact that you haven't got sufficient trackage up in the joint interchange yard to do your classification. Isn't that right?

A. No, it is merely the normal switching, because a cut of, say, 40 cars delivered from the G. M. & O. Railroad may have one car of steel and a car of flour and then a car of wood which would have to go out in the country; so the whole cut is brought over to the east side and broken up, and that part of it that goes back to the country is set out on the country track.

Q. You mean back to what country?

A. Well, to Southern Kraft and Hollingsworth & Whitney.

Q. You mean you all call this area out here around Chickasaw the country?

A. That is right.

Q. We didn't know that until just now.

[fol. 51] Mr. Darby: May the record show that Mr. Irvine pointed on your map No. 3 to the spot marked "South Yard Area"?

Mr. Rives: That is all right.

A. If by chance they did deliver—and they do—a solid cut of wood where it is all known and all known where it is going, it would be classified on a track that we have for that purpose.

Q. In the interchange yard?

A. In the interchange yard.

Q. Well, Mr. Irvine, is it not true that daily the switch engines of the Terminal Railway of the Alabama State Docks Department and the switch crews that operate the switch engines of the Terminal Railway of the Alabama State Docks Department move loaded railroad cars that have originated in points outside of the State of Alabama and where the cars are destined to some of these industries that I have named, such as the International Paper Com-

pany, Scott Paper Company, American Cyanamid Company and the other industries that I have named?

A. Yes.

Q. And isn't it also a daily occurrence that these switch engines and switch crews of the Terminal Railway of the Alabama State Docks Department take loaded railroad cars from these various industries that I have mentioned where the loaded cars are destined to points outside of the State of Alabama?

A. Yes.

Q. And I will ask you if it isn't a daily occurrence that these switch engines and switch crews of the Terminal Railway of the Alabama State Docks Department move loaded railroad cars that originated outside of the State [fol. 52] of Alabama and have moved into the State of Alabama and are taken to the dockside and the cargo delivered into ships and transported to foreign countries?

A. Yes.

Q. And isn't it a daily occurrence that cargoes of ships from foreign countries are unloaded into railroad cars at the Alabama State Docks and then moved by the switch engines and switch crews of the Terminal Railway of the Alabama State Docks Department over to the joint interchange yard and there delivered to either the Louisville & Nashville Railroad Company or the Gulf, Mobile & Ohio Railroad Company or the Southern Railway Company or the Alabama, Tennessee & Northern Railroad Company for transportation into states outside of the State of Alabama?

A. Yes, sir.

Q. Now, Mr. Irvine, is it or not true that the principal source of revenue of the Terminal Railway of the Alabama State Docks Department is for switching services rendered to the connecting carriers that I have named?

A. Yes, sir.

Q. Now on these deliveries that the Terminal Railway of the Alabama State Docks Department makes to these various industries that I have mentioned and for delivering cars that are received from these various railroads that I have mentioned down to the docks for unloading and transportation of the cargoes to foreign countries or other ports,

does the Terminal Railway of the Alabama State Docks Department collect a switching charge from these railroads for those switching services?

A. Yes, sir.

Q. And the principal revenue of the Terminal Railway of the Alabama State Docks Department is for such switching services?

A. Yes, sir.

[fol. 53] Q. And I believe that the Terminal Railway of the Alabama State Docks Department has its switching area divided into switching zones, does it not?

A. Yes, sir.

Q. And the switching rates are based upon the switching to each zone?

A. Yes, sir.

Q. Those rates into these various switching zones are agreed upon between the Terminal Railway of the Alabama State Docks Department and the various connecting railroads?

A. Yes, sir.

Q. Now do you have any idea about how many loaded railroad cars are interchanged each day at the joint interchange yard with these several connecting carriers, on an average?

A. The record for loaded cars would run between 250 and 600 cars a day. We try to say we can handle from 100,000 to 120,000 cars a year—that is loaded cars. It would be more cars if you have the empty cars.

Q. What would be the average number of cars handled per day at the joint interchange yard between the Terminal Railway and the connecting carriers, including loads and empties?

A. Three or four hundred cars a day.

Q. About how many cars are interchanged each day for the paper mills?

A. Our country run averages around 120 cars a day, 100 to 120 cars a day.

Q. And those cars going to the country are frequently delivered in cuts by the connecting carriers and carried in cuts either to the mill, if there is, say, 10 carloads of pulpwood, or if it is a cut of cars going to various indus-



tries, then the Terminal Railway has to classify them in [fol. 54] its classification yard there and then take them to the country?

A. That is right, yes, sir.

Mr. Rives: We want to offer as exhibits to the deposition of the witness Irvine these three maps which have heretofore been marked for identification as Exhibits 1, 2 and 3.

Q. How many diesel locomotives does the Terminal Railway of the Alabama State Docks Possess, Mr. Irvine?

A. Seven.

Q. Now generally the Terminal Railway—and when I refer to Terminal Railway hereafter I am referring to the Terminal Railway of the Alabama State Docks Department—uses railroad cars of foreign railroads, does it not?

A. Yes, sir.

Q. But the Terminal Railway does have some cars of its own?

A. Yes, sir.

Q. What type cars are those, Mr. Irvine?

A. Boxcars.

Q. It uses its own cars primarily for intra-plant servicing, does it not?

A. Yes, sir.

Q. Does the Terminal Railway have any locomotives cranes that it uses for any purposes such as rerailing a car that gets off the track or diesel locomotives that might get on the ground?

A. All of the crane equipment is owned by the Docks and not in the Terminal Railway account.

Q. The Terminal Railway doesn't have any cranes of its own?

A. No, sir.

[fol. 55] Q. How many persons are in the employment of the Terminal Railway of the Alabama State Docks Department?

A. A hundred and thirty.

Q. You are the general manager, but do you have somebody under you that is also in a supervisory capacity?

A. Yes, sir.

Q. Who is that?

A. Mr. Anthony Wallace.



Q. What is the title of his position?

A. Terminal Superintendent and General Yard Master.

Q. Now next under Mr. Wallace as Superintendent and General Yard Master, do you have yard masters?

A. Yes, sir.

Q. How many yard masters?

A. Four.

Q. Do you have a relief yard master?

A. Well, a relief yard master, yes,

Q. In addition to the ones you have just mentioned?

A. That is right.

Q. Do you have assistant yard masters?

A. No, we have clerks. They are not classified as assistant yard masters.

Q. Well, I mean, do you have extra yard masters?

A. An extra yard master would be a foreman who would be assigned temporary duty as assistant yard master.

Q. You refer to an engine foreman?

A. That is an engine foreman.

Q. That could work as a yard master?

A. That could work as a yard master.

Q. All right, how many engine foremen do you have, approximately?

[fol. 56] A. Offhand, 12, I will say.

Q. How many switchmen?

A. Well, it would be—there is probably 30 switchmen.

Q. How many locomotive engineers, approximately?

A. Oh, there is 18, I suppose, that are qualified.

Q. Does that include the firemen?

A. It would go into—you see, when a man is—when we don't use but 10 engines, the man who is qualified as an engineer, he would work as a fireman, according to the seniority.

Q. How many engineers and firemen do you have, approximately?

A. Well, the roster has got about 40 people on it, I think. That includes engineers, firemen and all of them. They all work on a seniority basis and have a dual classification.

Q. I understand that a fireman can work as an engineer, and if there is not enough work for him to work as an engineer, he can drop back and work as a fireman.

A. Correct.

Q. There are about 40 men in that classification?

A. Approximately.

Q. Does the Terminal Railway have car inspectors?

A. Yes, sir.

Q. How many car inspectors, approximately?

A. About seven.

Q. Does the Terminal Railway have machinists?

A. Yes, sir.

Q. Do you know how many machinists?

A. Five or six.

Q. Electricians?

A. Two, I think.

Q. Boilermakers?

A. Two, I believe, of those.

[fol. 57] Q. Now the car inspectors and the machinists, they are in the mechanical department, aren't they, of the Terminal Railway?

A. Yes, sir.

Q. Then do you have employees of the Terminal Railway in the maintenance of way department that maintain the trackage?

A. Yes, sir.

Q. About how many employees in the maintenance of way department?

A. Forty-two, I think.

Q. When the Terminal Railway has possession of a foreign car—and when I refer to a foreign car I mean of another railroad like the Louisville & Nashville Railroad Company—under the rules and regulations of the Association of American Railroads is a charge imposed against the Terminal Railway in favor of, say, the owner of a car, like the L. & N. Railroad Company for the per day use of that car?

A. Yes, sir.

Q. What is the charge per day for a foreign car in the custody of the Terminal Railway?

A. It varies, but I think it is \$2.28 now.

Q. But now since the Terminal Railway, in delivering cars to these various industries and delivering them to the docks, are rendering a switching service to the railroad

for which the railroad pays a charge, is there any reimbursement to the Terminal Railway for this car usage?

A. Yes, sir.

Q. In other words, the Terminal Railway, if it had an L. & N. car for three days; it would have to pay the L. & N. for three days' use of that car. Is that right?

A. That is right.

[fol. 58] Q. But since the Terminal Railway is rendering a switching service for the L. & N. in delivering that car to the industry or to the docks, they in turn reimburse the Terminal Railway for that charge, do they not? That rental?

A. I might differentiate you—you have a switching charge, we will say—I think it is \$10.89 for a Zone 1 switching. We are reimbursed by the line haul carrier for the average number of days cars are detained on the track. Right at the present time detention is, I think, 2.83 days in which they pay us that amount of money in addition to switching for the service we have rendered. The amount accounted for payment of rent and for use of the car is on a basis of adjustment every periodic time to maintain no earning for any question of the number of days we handle the car.

Q. The primary reason for the railroads reimbursing the Terminal Railway for some of these car use charges is because the Terminal Railway has rendered a switching service to that railroad with that car. Is that right?

A. Yes; the railroads pay us what it costs to switch, and they eliminate what the car rental is. They don't pay us for a car rental. We—

Q. You have to pay that?

A. Well, they pay us. I might say this: You pay for cars to 42 different railroads, and the line haul carrier pays us that amount that we pay these 42 carriers.

Q. You have the same general arrangement with all the railroads, do you not?

A. That is right.

Q. Now, Mr. Irvine, you were subpoenaed to bring to this hearing a book of the operating rules governing Terminal Railway employees, and I believe you brought this book here, did you not?

A. Well, it is here. I presented it. Yes, I brought it.  
[fol. 59] Q. Is that the book of operating rules in force and effect on the Terminal Railway of the Alabama State Docks Department?

A. Yes.

Mr. Rives: We want this in evidence As Exhibit 4 to the deposition of the witness Irvine.

(The reporter so marked the document.)

Q. Now, Mr. Irvine, you were asked to bring the work schedules or working agreements between the Terminal Railway of the Alabama State Docks Department and the various railroad brotherhoods. Now what schedules or working agreements have you brought here to the hearing?

A. Well, there is the Locomotive Engineer Agreement.

Mr. Rives: All right, we will have that marked as Exhibit 5 to your deposition.

(The reporter so marked the document.)

Q. What is the next one, Mr. Irvine?

A. We have an agreement between the Engineers, Firemen and Yardmen.

Mr. Rives: We ask that that one be marked Exhibit 6.

(The reporter so marked the document.)

Q. All right, do you have another?

A. We have the agreement of the Carmen, Machinists and Boilermakers.

[fol. 60] Mr. Rives: We ask that that be marked as Exhibit 7 to the deposition of the witness Irvine.

(The reporter so marked document.)

Q. Do you have another?

A. I have an agreement with the Railway and Steamship Clerks and Freight Handlers.

Mr. Rives: All right, we ask that this be introduced as Exhibit 8 to the deposition—

Mr. Darby: You are going to have Mr. Hubbard make copies of those and return the originals to us, because those are our originals on these—the paper ones; not the books.

Mr. Rives: You haven't got another mimeographed copy of them?

Mr. Darby: No, sir, we don't.

Mr. Rives: Well, we will now stipulate that in any case where it is mutually agreeable we can substitute a photostat for the original and the photostat will be treated the same as if it was an original.

Mr. Darby: That is agreeable to us.

[fol. 61] Mr. Rives: There will be no objection on the ground that it is a photostat rather than the original?

Mr. Darby: None whatsoever. You have offered the original, but we can't give it to you because it is our only copy.

Mr. Rives: All right, let's mark this agreement with the Clerks as Exhibit 8, and there is a sheet in there that can be marked 8-A, this sheet right here:

(The reporter marked the documents as indicated.)

Q. Do you have another?

A. We have the agreement with the Brotherhood of Maintenance and Way Employees.

Mr. Rives: We ask that that be marked as Exhibit 9 and considered as an exhibit to the deposition of the witness Irvine.

(The reporter so marked the document.)

Q. To the best of your knowledge, Mr. Irvine, does this represent all of the schedules and working agreements between the various railroad brotherhoods and the Terminal Railway?

A. Yes, sir.

Q. Mr. Irvine, if there is an accident in the operations of the Terminal Railway of the Alabama State Docks Department in which an employee is injured and because of the injury he is off duty more than 72 hours, is any report [fol. 62] made by the Terminal Railway of the Alabama

State Docks Department on that personal injury to the Interstate Commerce Commission?

A. Yes, sir.

Q. Who makes out that report and forwards it to the Interstate Commerce Commission?

A. The Secretary or the Auditor of the Terminal Railway.

Q. Who would that be?

A. Mr. Allum.

Q. Now I believe that matter of 72 hours has recently been reduced to about 24 hours, hasn't it? Or do you know about that?

A. I don't know. The report—immediate report—we make a monthly report, but now to the Interstate Commerce Commission on immediate reports, I am not posted on that at all.

Q. But monthly you do report—?

A. Monthly we do make a regular report.

Q. —to the Interstate Commerce Commission where injuries result in a man being off more than 72 hours?

A. That is right.

Mr. Irvine: Thank you, Mr. Irvine, and I don't think it will be necessary to take up the time of Mr. Wallace or Mr. Scott. I think Mr. Irvine is sufficiently familiar with the operations and has covered it to such an extent that it is not necessary to take up any further time on that; so we won't examine Mr. Wallace or Mr. Scott, and as far as I am concerned we will excuse all three of them.

Mr. Darby: I am going to ask a few questions of Mr. Irvine. Do you want to excuse them now, or do you want to wait until after I have finished questioning Mr. Irvine? [fol. 63] Mr. Rives: Well, we had better wait, because you may bring out something Mr. Irvine doesn't know.

Cross examination.

By Mr. Darby:

Q. Mr. Irvine, does the Terminal Railway of the Alabama State Docks have a separate bank account?

A. No, sir.



Q. How many bank accounts do you have at the Alabama State Docks Department?

A. In the account of the State Docks there is money in the three banks, the American and the First National Bank and the Merchants.

Q. But they are all accounts of the Alabama State Docks Department?

A. Correct.

Q. In that name?

A. Yes, sir.

Q. Does each division or construction unit of the State's facilities known as the Alabama State Docks Department maintain a separate account for depreciation and income purposes in the Treasurer's Department of the Alabama State Docks Department?

A. The accounting is made separately.

Q. That is, the income and the receipts and the expenses attributable to a particular operation such as the Terminal Railway or the Grain Elevator are kept separately so you can see what that facility is doing?

A. Yes, and it is compulsory in view of the bond issue requirements that require separate accounting.

Q. And that is pursuant to the Acts of the Legislature establishing the Alabama State Docks Department?

A. Yes, sir.

[fol. 64] Q. Now the joint interchange yard that is referred to on these various maps—and let me refer to some particular one of them so we will have it. I am referring now to Exhibit No. 2, and I am directing your attention to the joint interchange which is north of the L. & N. yards. Who is it that owns the physical property on which those tracks sit?

A. State Docks.

Q. And is that the property of the State of Alabama?

A. The State of Alabama.

Q. And who is it that owns the rails in that interchange yard?

A. The State Docks.

Q. Mr. Irvine, I hand you a contract—let me let these gentlemen see it, because they haven't seen it.

(Mr. Darby handed a document to Messrs. Rives and Conway.)

Q. Mr. Irvine, is that the original agreement between the State and the Hollingsworth and Whitney on the establishment of the connection between the Terminal Railway and the Hollingsworth and Whitney?

A. Yes, that is correct.

Q. What is that company known as today?

A. Scott Paper Company.

Mr. Darby: I would like to offer that as Defendants' Exhibit 1 to Mr. Irvine's deposition.

(The reporter marked the document as indicated.)

Mr. Darby: That is all I am going to ask him.

[fol. 65] Re-direct examination.

By Mr. Rives:

Q. Mr. Irvine, the operations of the Terminal Railway of the Alabama State Docks Department are kept separately from the operations of the other departments of the Alabama State Docks Department for bookkeeping and accounting purposes, are they not?

A. Under the service license of the ICC you are required to keep accounts according to their regulations. We keep a set of accounts to comply with their distribution regulations, and as far as the State Docks accounts, there is a separate State Docks accounting, as there is for the Docks Department, the Cold Storage Plant, Bulk Handling Plant, the Grain Elevator—

Q. And the Terminal Railway?

A. And the Terminal Railway. Now that is not only by reason of the bond—for the bond holders, but it is in keeping with ordinary business practices, to keep your accounts so separated and designated that you know whether you are making money in this particular activity.

Q. That is, whether the Terminal Railway Department is making money or losing money, is it not?

A. That is right.

Q. Now you have brought to the hearing these work schedules and work agreements between the Terminal Railway and the various railroad brotherhoods. If there is to be a change in any of those schedules or work agreements, usually the change is reduced to writing and someone signs it for the railroad brotherhood concerned and somebody signs it for the Terminal Railway, do they not?

A. Yes, sir.

Q. Do you sign those changes on behalf of the Terminal Railway?

[fol. 66] A. Yes, sir. My recollection is that most of them—there have been some that have been signed by the Director.

Q. The general rule is that you sign them? The exceptions would be for anybody else to sign them. Is that right? For the Terminal Railway?

A. Yes. It is signed subject to the Director's approval. It is a matter of convenience and understanding that I have been the one that has taken—has signed probably most of them.

Q. What about if there is any change in any of the operating rules?

A. I would sign those. However, any director—if he said he wanted to—if he said he wanted to, or, "You don't sign them; I will sign them." But there is considerable technicality and hurry, and I have signed some of them. Mr. McGowin signed this.

Q. But generally speaking, if there is any change herein this book of rules governing Terminal Railway employees, which is Exhibit 4 to your deposition, you would be the one to sign that on behalf of the Terminal Railway, generally speaking?

A. Yes, sir. It is accepted by the group of people that—officials for the union and—but it hasn't been strict contractual formality.

Q. Well, they come in and discuss it with you, and if you all can agree you sign for the Terminal Railway and somebody signs for the union?

A. Correct.

Mr. Rives: I think that is all, Mr. Irvine.

[fol. 67].      Re-cross examination.

By Mr. Darby:

Q. Mr. Irvine, in connection with the collective bargaining agreements, do you always obtain first the approval of whoever the Director might be before entering into one of them, particularly if it involves any wage or other increases?

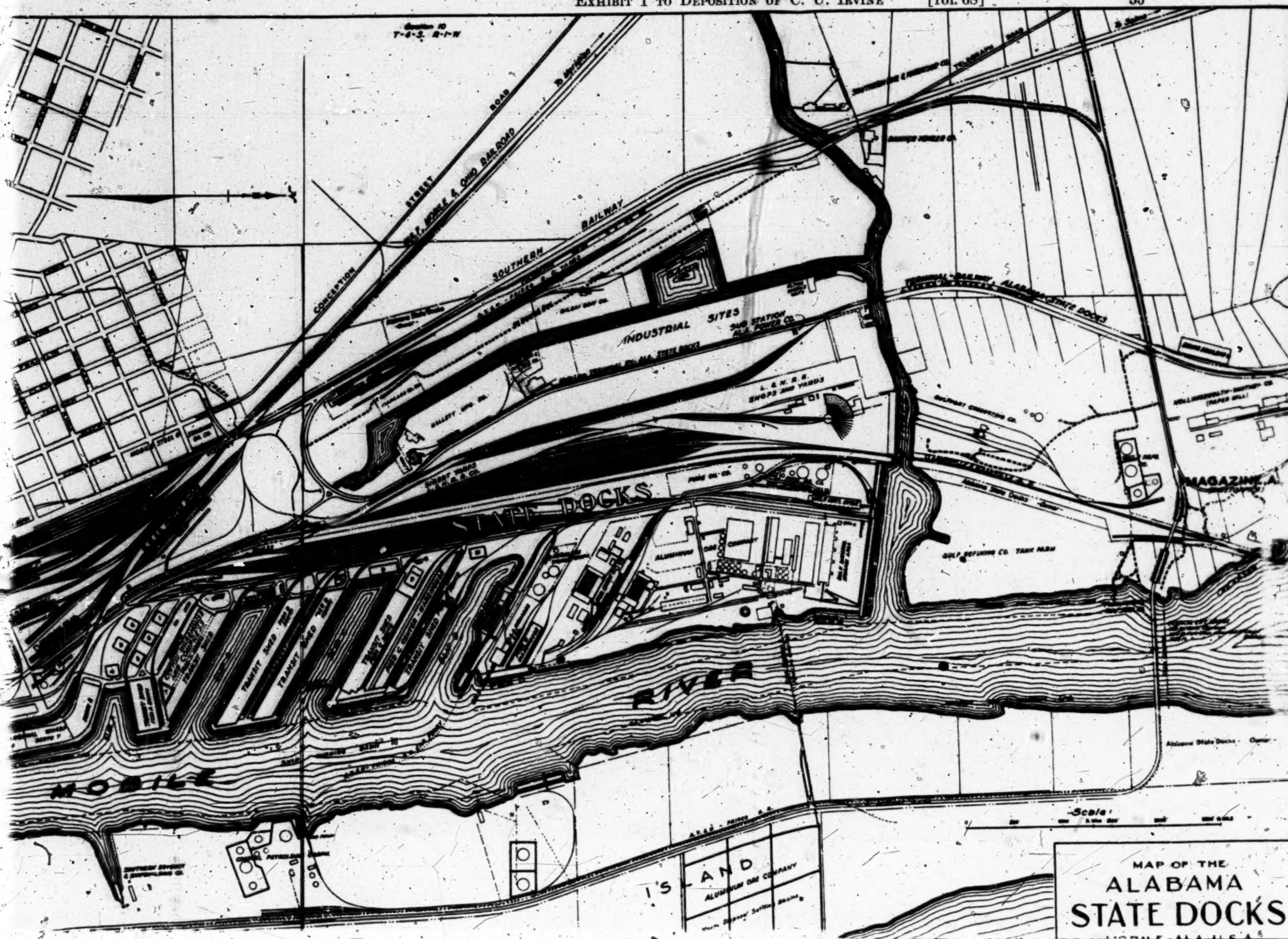
A. No wage increase of any nature is approved without the Director's authorization. He is the only one that I know of that is authorized to pay out money for the State. The Treasurer wouldn't pay out any money unless he has the proper authority from the Director.

Mr. Darby: That is all.

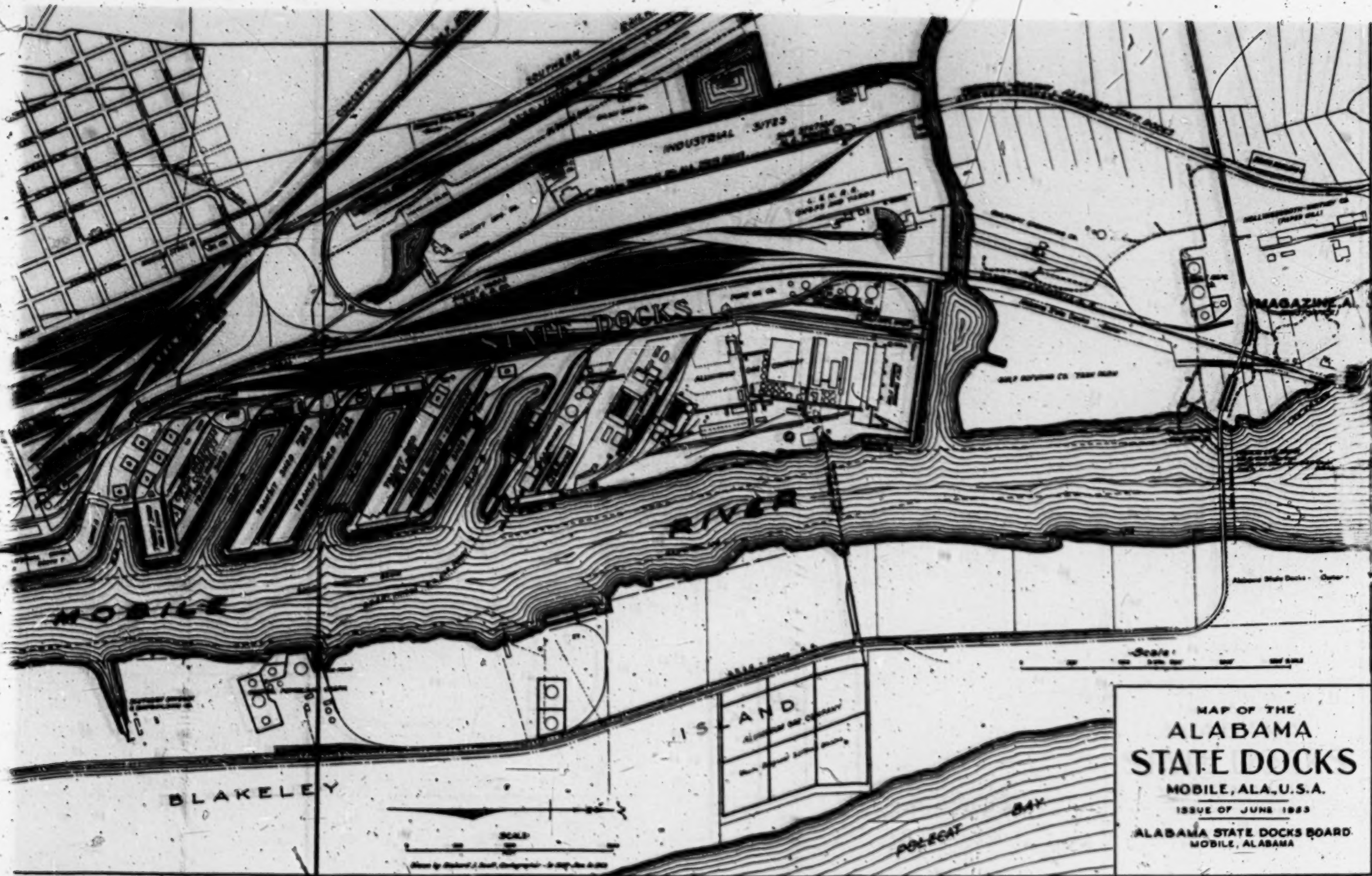












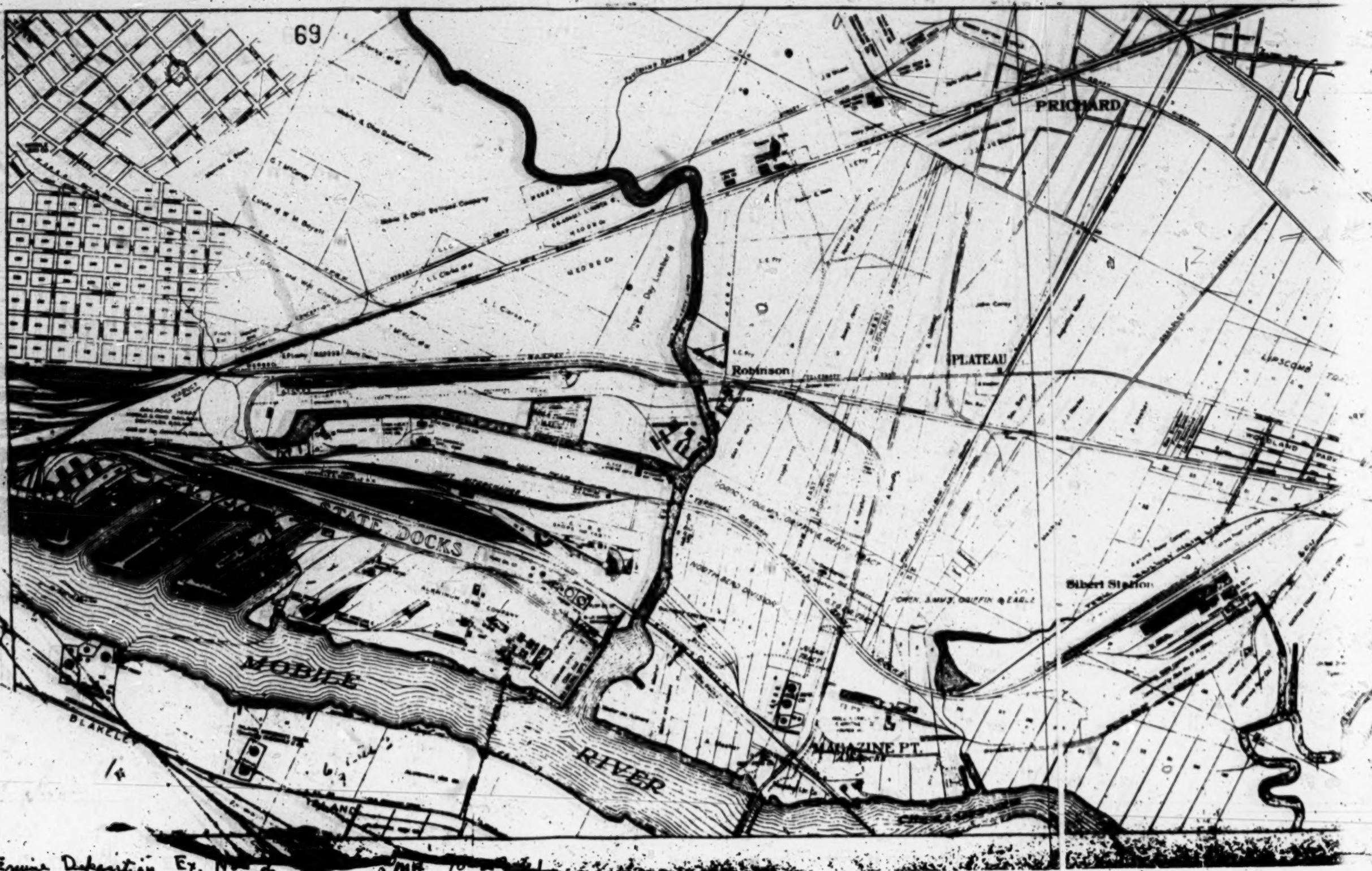
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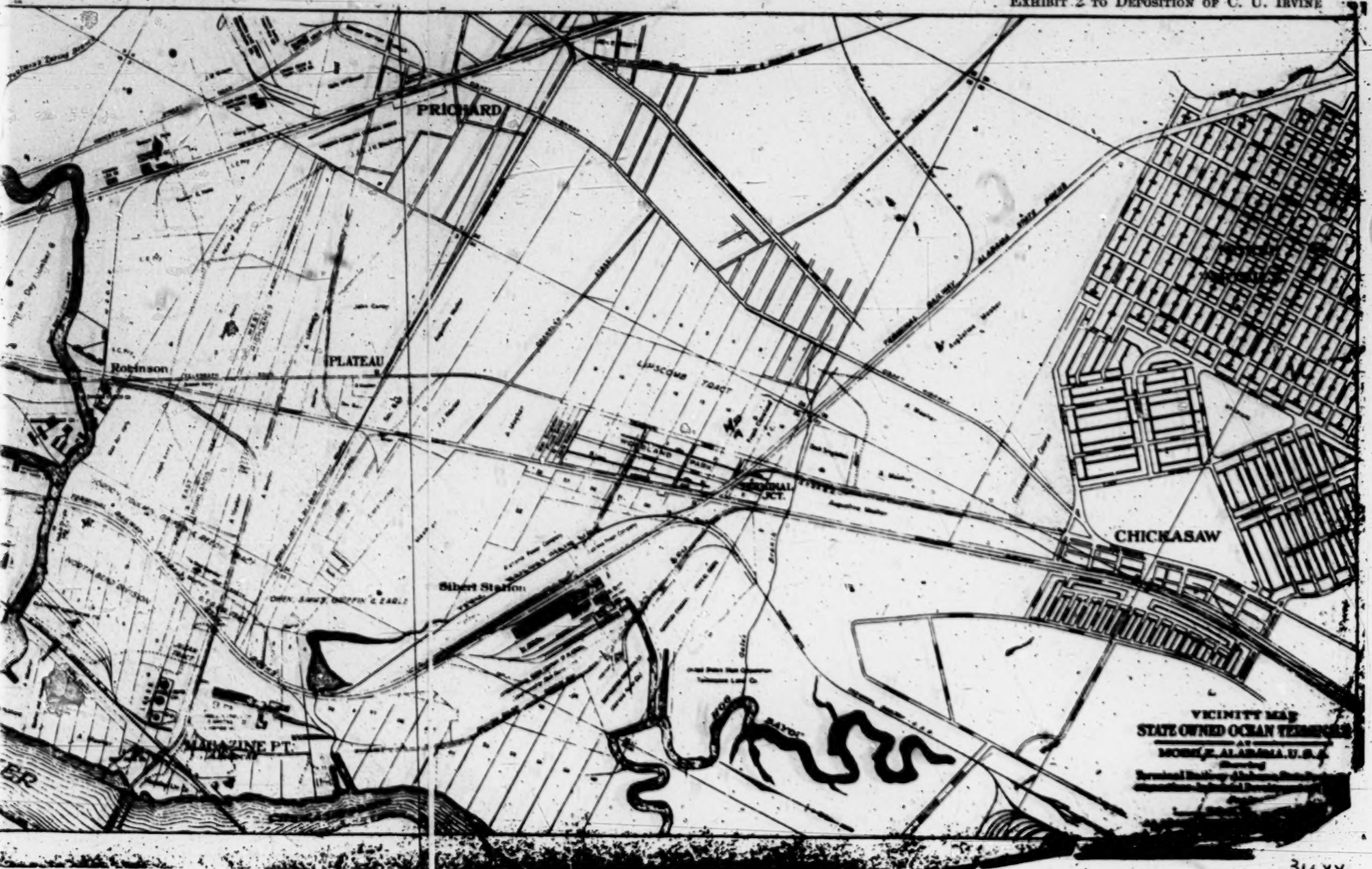


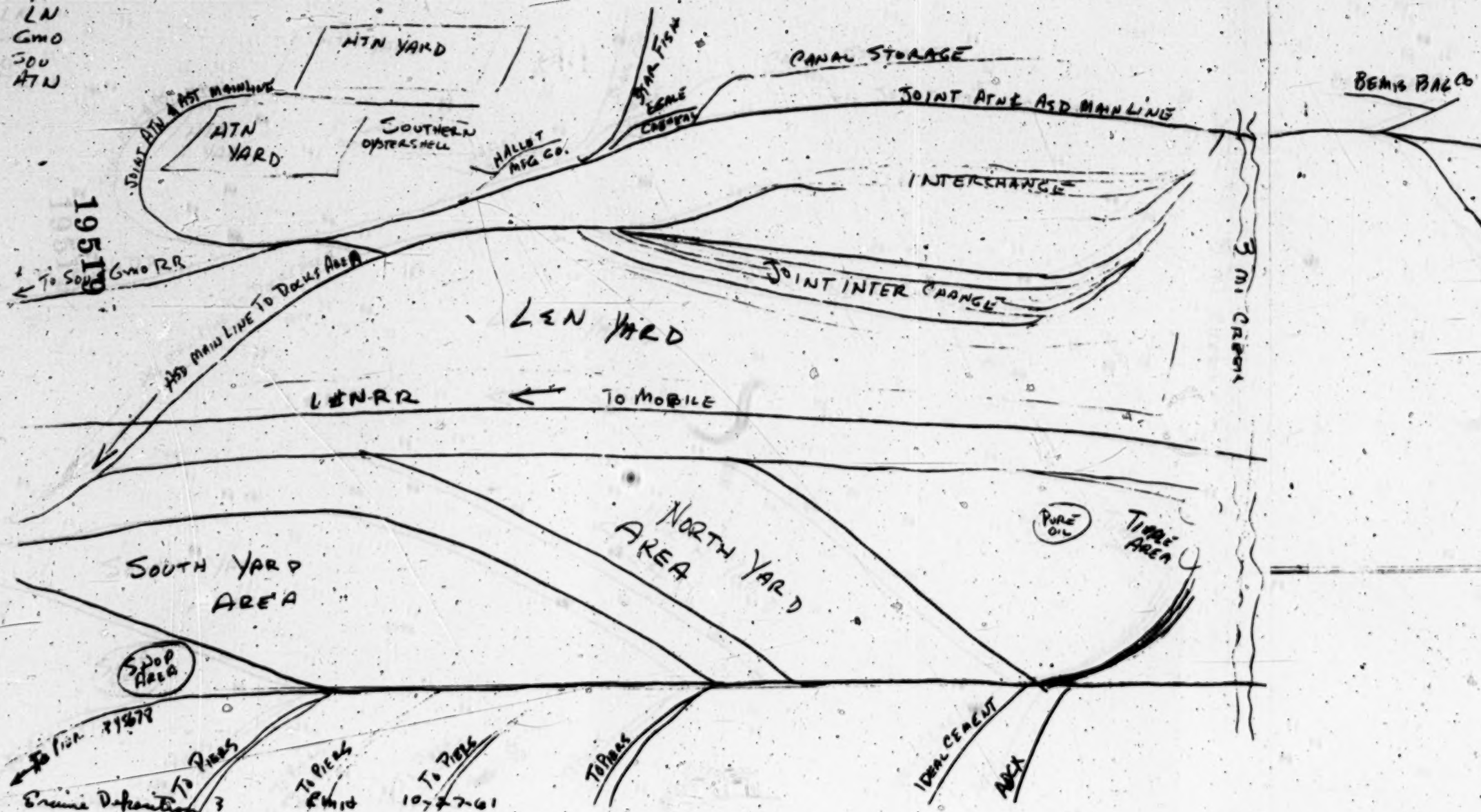














BRIDGE  
TRAM TRACK

TO MAINE

To Bldg

SOUTHERN RR

LAGE

BINT AINE ASD MAINLINE

BENIS BALCO

JOINT AINE ASD MAINLINE

INTERCHANGE

INTERNATIONAL  
PAPER CO

SCOTT  
TAPER  
CO

CARAGE

3 MI CAPON

AMERICAN  
ALYND CO

PURE  
OIL

TIME  
AREA

GULF SAFF YARD

ALYND  
CO

IDEALCIMENT  
ACK



[fol. 71]

## EXHIBIT 4 TO DEPOSITION OF C. U. IRVINE

1308. Employees must not make any statement, either oral or written, concerning any accident, claim or suit in which the company is, or may be involved, to any person other than authorized representative of the railway, without permission, Except in cases arising under the Federal Employers' Liability Act, otherwise known as "an act relating to the liability of common carriers by railroad to their employees in certain cases."

(The management has no desire to prevent employees from voluntarily furnishing information to a person in interest as to the facts incident to the injury to or death of any Employee whose case arose under this Act. However, employees are advised they cannot be compelled to furnish such information, except by subpoena. It is suggested that if no information is given there is no possibility of embarrassment to an employee through his information being misquoted or misinterpreted. Information furnished should be confined to personal knowledge of the facts, and not from information taken from the files or records, or other privileged or confidential reports of the company. It is suggested, when such information is requested that employees communicate with superintendent, claim agent or company attorney handling the case, to ascertain if it is actually under said Act and whether the person requesting such information is a person in interest.)

[fol. 72] IN UNITED STATES DISTRICT COURT

ORDER QUASHING SERVICE AND DISMISSING ACTION—  
December 29, 1961

This cause having come on to be heard in open Court on the motion to quash return of service of summons or to dismiss the action.

Arguments by Attorneys of Record were heard and the motion was taken under submission by the Court.

Now, after consideration thereof,

It Is Ordered by the Court that the motion of the Sovereign State of Alabama to quash return of service of summons be, and the same hereby is, Granted, and

It Is Further Ordered by the Court that the motion of the Sovereign State of Alabama to dismiss the action be, and the same hereby is, Granted, with costs herein taxed against the Plaintiff.

Made at Mobile, Alabama, this the 29th day of December A.D., 1961.

Daniel H. Thomas, United States District Judge.

Recitation:

"Orders identical to those entered on December 29, 1961 and January 22, 1962, in Civil Action Number 2551, were entered in Civil Actions Numbered 2552, 2553, 2588 and 2679."

[fol 73] IN UNITED STATES DISTRICT COURT

CORRECTED ORDER—January 22, 1962

For good cause shown, the order entered herein on the 29th day of December, 1961 is revised to correct errors therein arising from oversight or omission, so as to read as follows:

This cause having come on to be heard in open Court on the motion to quash return of service of summons or to dismiss the action, and the same having been submitted upon the verified motion, affidavits of Honorable John Patterson, William J. Colley, Ralph P. Eagerton, and C. U. Ervine filed in support thereof, and the depositions of Earl M. McGowin and C. U. Ervine, together with exhibits thereto.

Arguments by Attorneys of Record were heard and the motion was taken under submission by the Court.

Now, after consideration thereof,

It Is Ordered by the Court that the motion of the Sovereign State of Alabama to quash return of service of summons be, and the same hereby is, Granted, and

It Is Further Ordered by the Court that the motion of the Sovereign State of Alabama to dismiss the action be, and the same hereby is, Granted, with costs herein taxed against the plaintiff.

Made at Mobile, Alabama, this 22nd day of January, A.D., 1962.

Daniel H. Thomas, United States District Judge.

[fol. 74] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—January 24, 1962

Notice is hereby given that R. B. Parden, Plaintiff in the above styled cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit, from the order entered herein on the 29th day of December, 1961, as corrected by the order entered herein on the 22nd day of January, 1962, by which order or orders this action was dismissed, and the return of service of summons was quashed.

This the 24 day of January, 1962.

Al G. Rives, T. M. Conway, Jr., Attorneys for Plaintiff.

1007 Massey Building, Birmingham, Alabama.

Rives, Peterson, Pettus & Conway, 1007 Massey Building, Birmingham, Alabama, Of Counsel for Plaintiff.

Recitation:

"Notices of Appeal identical to that filed in Civil Action Numbered 2551 were filed in Civil Actions Numbered 2552, 2553, 2588 and 2679 on January 25, 1962."

[fol. 75] IN UNITED STATES DISTRICT COURT

MOTION TO CONSOLIDATE CASES ON APPEAL—  
Filed January 29, 1962

Come the plaintiffs in the above styled causes, separately and severally, and show unto the Court that they have separately given notices of appeal to the United States Court of Appeals for the Fifth Circuit, such notices having been filed on the 25th day of January, 1962; that the issues in these cases on appeal are the same, or so substantially similar that the five cases can readily be decided together; that the preparation of five separate records would be unduly expensive and would render the handling of the appeals by the United States Court of Appeals for the Fifth Circuit cumbersome and unduly burdensome.

Wherefore, Premises Considered, plaintiffs, separately and severally, move the Court to enter an order consolidating these cases on appeal, and directing the Clerk to submit one consolidated record to the United States Court of Appeals for the Fifth Circuit.

Al G. Rives, T. M. Conway, Jr., and Rives, Peterson, Pettus & Conway, By T. M. Conway, Jr.,  
Attorneys for Plaintiffs.

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[fol. 76] IN UNITED STATES DISTRICT COURT

ORDER CONSOLIDATING CASES ON APPEAL—  
January 29, 1962

Upon motion of the plaintiffs in the above causes, and for good cause shown, the Court is of the opinion that the above cases should be consolidated on appeal, it is hereby Ordered that the above styled cases be and the same hereby are consolidated for purposes of the appeals taken by the plaintiffs by notices of appeal filed on the 25th day of January, 1962, and the Clerk is directed to submit one consolidated record to the United States Court of Appeals for the Fifth Circuit.

Made at Mobile, Alabama, this the 29th day of January,  
A.D., 1962.

Daniel H. Thomas, United States District Judge.

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[fol. 77] IN UNITED STATES DISTRICT COURT

Civil Action No. 2552

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R. B. PARDEN, Plaintiff,

VS..

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on June 3, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, Defendants.

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COMPLAINT—Filed February 23, 1961

Comes the plaintiff in the above styled cause and brings this action against the defendants Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on June 3, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, and for cause of action against the said defendants, alleges as follows:

I.

1. That the plaintiff R. B. Parden is a resident and citizen of Mobile County in the State of Alabama, his address being 1005 Oak Street, Mobile, Alabama.



[fol. 78]

## II.

1. That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State-Docks are common carriers by railroad and as such common carriers by railroad have at all times herein mentioned been engaged in the business of operating a railroad for the transportation of freight for hire in commerce between the several states of the United States of America and in foreign commerce.

2. (a) That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are the only departments within the Government of the State of Alabama which operate solely from the money they make themselves.

(b) That the said defendants get no legislative appropriation, and

(c) That the said defendants operate as a self-sustaining business, generating their own funds.

## III.

1. That the jurisdiction of the United States District Court for the Southern Division of the Southern District of Alabama is based upon an Act of the Congress of the United States known as the Federal Employers Liability Act, Title 45, U.S.C.A. Section 51 et seq.

## IV.

1. That the defendants as such common carriers by railroad as described in Paragraph II, 1 of this complaint and its employees have at all times herein mentioned been [fol. 79] subject to the provisions of the aforesaid Federal Employers Liability Act, an Act of the Congress of the United States enacted for the protection and benefit of employees of common carriers by railroad engaged in such aforesaid interstate and foreign commerce who are injured or killed in line of duty.



## V.

## First Cause of Action.

For plaintiff's first cause of action, plaintiff adopts the allegations of Paragraphs I, II, III and IV of this complaint and adds thereto the following allegations, viz:

Plaintiff avers that on, to-wit, June 3, 1958 he was employed by the defendants as a railroad switchman at Mobile, Alabama and that a part of his duties as such railroad switchman for the defendants was in furtherance of such aforesaid interstate or foreign commerce or directly or closely and substantially affected such commerce and plaintiff avers that on said date while he was attempting to throw a railroad switch on a track known as the "Hopper Track" at the place of business of the Southern Oyster Shell Company in Mobile County, Alabama and while engaged in and about the performance of his work as such railroad switchman for the defendants, his back was injured and he was injured internally and was otherwise injured and a previous condition was aggravated, all to such extent that plaintiff was caused to be disabled and made sick and sore and caused to suffer physical pain and mental anguish and caused to lose wages from his employment as a railroad switchman and plaintiff's power and capacity to work and earn money was impaired; and plaintiff [fol. 80] tiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the defendants in that the defendants negligently failed to exercise reasonable care to furnish or maintain said railroad switch in a reasonably safe and suitable condition for its use by the plaintiff in the performance of his said work for the defendants.

## VI.

## Second Cause of Action.

For plaintiff's second cause of action, plaintiff adopts the allegations of Paragraph V of this complaint except that in lieu of the following allegations in said Paragraph V, viz:

"Plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the defendants in that the defendants negligently failed to exercise reasonable care to furnish or maintain said railroad switch in a reasonably safe and suitable condition for its use by the plaintiffs in the performance of his said work for the defendants."

plaintiff inserts the following allegations, viz:

"plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the defendants in that the defendants negligently failed to exercise reasonable care to furnish or maintain plaintiff a reasonably safe place to perform his aforesaid work for the defendants."

[fol. 81]

## VII.

### Third Cause of Action.

For plaintiff's third cause of action, plaintiff adopts the allegations of Paragraph V of this complaint except that in lieu of the following allegations in said Paragraph V, viz:

"plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the defendants in that the defendants negligently failed to exercise reasonable care to furnish or maintain said railroad switch in a reasonably safe and suitable condition for its use by the plaintiff in the performance of his said work for the defendants."

plaintiff inserts the following allegations, viz: •

"plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the officers, agents or employees of the defendants while acting within the line and scope of their employment by the defendants or by reason of a defect or insufficiency due to the negligence of the defendants in said railroad switch, track, roadbed, machinery, appliances or other equipment."

## VIII.

Wherefore, plaintiff prays judgment against the defendants under each of the aforesaid causes of action in the amount of Five Thousand (\$5,000.00) Dollars.

[fol. 82]

## IX.

Plaintiff demands a jury trial.

Rives, Peterson, Pettus & Conway, By Al G. Rives,  
Attorneys for Plaintiff.

Tenth Floor, Massey Building, Birmingham 3, Alabama;  
Telephone ALpine 1-3275.

Note to United States Marshal:

Summons and complaint in this action should be served on Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, etc. by leaving a copy thereof with the Honorable Earl M. McGowin, Director of the said Terminal Railway of the Alabama State Docks Department.

Filed Feb. 23, 1961.

[fol. 83] IN UNITED STATES DISTRICT COURT  
Civil Action File No. 2552

R. B. PARDEN, Plaintiff,

v.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, etc., Defendant.

SUMMONS IN A CIVIL ACTION—February 24, 1961

To the above named Defendants:

You are hereby summoned and required to serve upon Mr. A. G. Rives, Attorney, Rives, Peterson, Pettus & Con-

way, plaintiff's attorney, whose address is: Tenth Floor, Massey Building, Birmingham 3, Alabama, an answer to the complaint which is herewith served upon you, within (Twenty) 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

William J. O'Connor, Clerk of Court, Minnie Pearl Cox, Deputy Clerk.

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 84]      Return of Service of Writ.

I hereby certify and return, that on the 24th day of Feb. 1961, I received this summons and served it together with the complaint herein as follows: On Feb. 24th, 1961 at Mobile, Ala. served copy of each on C. U. Irvine, General Manager of Operations, Terminal Railway Of The Alabama State Docks Department; and Terminal Railway of Alabama State Docks, etc.

J. L. May, United States Marshal.

By W. F. Armstrong, Deputy United States Marshal.

Marshal's Fees

Travel	\$ .40
Service	2.00
	<hr/>
	2.40

Filed Feb. 27, 1961.

Motion to Quash Return of Service of Summons or to Dismiss Action, Civil Action No. 2552;

Affidavit of C. U. Irvine, Civil Action No. 2552;

Affidavit of Ralph P. Eagerton, Civil Action No. 2552;

Affidavit of William J. Colley, Civil Action No. 2552;

Affidavit of John Patterson, Civil Action No. 2552;

Order Quashing Service and Dismissing Action, Civil Action No. 2552;

[fol. 85] Corrected Order, Civil Action No. 2552;

Notice of Appeal, Civil Action No. 2552;

Omitted from the Printed Record pursuant to Appellant's Designation as to Printing Record heretofore copied at page 1.

IN UNITED STATES DISTRICT COURT

Civil Action No. 2553

OTTO DRISKELL, Plaintiff,

VS.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on July 22, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, Defendants.

COMPLAINT—Filed February 23, 1961

Comes the plaintiff in the above styled cause and brings this action against the defendants Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, whose true and correct name [fol. 86] and legal status is otherwise unknown to the



plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on July 22, 1958 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, and for cause of action against the said defendants, alleges as follows:

### I.

1. That the plaintiff Otto Driskell is a resident and citizen of Mobile County in the State of Alabama, his address being Route 4, Box 330, Mobile, Alabama.

### II.

1. That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are common carriers by railroad and as such common carriers by railroad have at all times herein mentioned been engaged in the business of operating a railroad for the transportation of freight for hire in commerce between the several states of the United States of America and in foreign commerce.

2. (a) That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are the only departments within the Government of the State of Alabama which operate solely for the money they make themselves.

(b) That the said defendants get no legislative appropriation, and

[fol. 87] (c) That the said defendants operate as a self-sustaining business, generating their own funds.

### III.

1. That the jurisdiction of the United States District Court for the Southern Division of the Southern District of Alabama is based upon an Act of the Congress of the United States known as the Federal Employers Liability Act, Title 45, U.S.C.A. Section 51 et seq.



## IV.

1. That the defendants as such common carriers by railroad as described in Paragraph II, 1 of this complaint and its employees have at all times herein mentioned been subject to the provisions of the aforesaid Federal Employers Liability Act, an Act of the Congress of the United States enacted for the protection and benefit of employees of common carriers by railroad engaged in such aforesaid interstate and foreign commerce who are injured or killed in line of duty.

## V.

## First Cause of Action.

For plaintiff's first cause of action, plaintiff adopts the allegations of Paragraphs I, II, III and IV of this complaint and adds thereto the following allegations, viz:

Plaintiff avers that on, to-wit, July 22, 1958 he was employed by the defendants as a railroad switchman at Mobile, Alabama and that a part of plaintiff's duties as such railroad switchman for the defendants was in furtherance of [fol. 88] such aforesaid interstate or foreign commerce or directly or closely and substantially affected such commerce and plaintiff avers that on said date while plaintiff and other members of a switching crew of the defendants were engaged in and about the switching of railroad cars at the plant of the International Paper Company in Mobile and while plaintiff was riding on a railroad car in a cut of railroad cars that were being moved along Track 4½ at the said plant of International Paper Company in Mobile, Alabama, plaintiff was caused to be knocked off of the railroad car upon which he was riding as aforesaid by a railroad car that was standing on Track 4 at said plant of the International Paper Company and plaintiff was thereby caused to be injured in and about his hip and head and he was caused to be injured internally and was made sick and sore and caused to suffer great physical pain and mental anguish and was caused to be hospitalized and to undergo medical and surgical care and treatment and was caused to incur expense for such hospitalization and care and treatment and for medicines and was caused to lose wages from his em-

ployment and plaintiff's power and capacity to work and earn money was impaired; and plaintiff avers that he was caused to be knocked from the aforesaid moving railroad car upon which he was riding as aforesaid and he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in-whole or in part, of the negligence of the officers, agents or employees of the defendants while acting within the line and scope of their employment by the defendants or by reason of a defect or insufficiency due to the negligence of the defendants in their cars, track, roadbed, works, machinery, appliances or other equipment.

[fol. 89]

## VI.

### Second Cause of Action.

For plaintiff's second cause of action, plaintiff adopts the allegations of Paragraph V of this complaint except that in lieu of the following allegations in said Paragraph V, viz:

"and plaintiff avers that he was caused to be knocked from the aforesaid moving railroad car upon which he was riding as aforesaid and he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the officers, agents or employees of the defendants while acting within the line and scope of their employment by the defendants or by reason of a defect or insufficiency due to the negligence of the defendants in their cars, track, roadbed, works, machinery, appliances or other equipment."

plaintiff inserts the following allegations, viz:

"and plaintiff avers that he was caused to be knocked from the aforesaid moving railroad car upon which he was riding as aforesaid and he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the defendants in that the defendants negligently failed to exercise reasonable care to furnish or maintain plaintiff a reasonably safe place to perform his aforesaid work for the defendants."

## VII.

Wherefore, plaintiff prays judgment against the defendants under each of the aforesaid causes of action in the amount of Five Thousand (\$5,000.00) Dollars.

[fol. 90]

## VIII.

Plaintiff demands a jury trial.

Rives, Peterson, Pettus & Conway, By: Al G. Rives,  
Attorneys for Plaintiff.

Tenth Floor, Massey Building, Birmingham 3, Alabama,  
Telephone ALpine 1-3275.

Note to United States Marshal:

Summons and complaint in this action should be served on Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, etc. by leaving a copy thereof with the Honorable Earl M. McGowin, Director of the said Terminal Railway of the Alabama State Docks Department.

[fol. 91]

IN UNITED STATES DISTRICT COURT

Civil Action No. 2553

OTTO DRISKELL, Plaintiff,

v.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, Etc., Defendant.

SUMMONS—February 24, 1961

To the above named Defendants:

You are hereby summoned and required to serve upon Mr. Al G. Rives, Attorney, Rives, Peterson, Pettus & Conway, plaintiff's attorney, whose address Tenth Floor, Mas-

sey Building, Birmingham 3, Alabama, an answer to the complaint which is herewith served upon you, within (Twenty) 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

William J. O'Connor, Clerk of Court.

Minnie Pearl Cox, Deputy Clerk.

(Seal)

[Seal of Court]

Note—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 92]

Return on Service of Writ.

I hereby certify and return, that on the 24th day of Feb. 1961, I received this summons and served it together with the complaint herein as follows: On Feb. 24th, 1961 at Mobile, Ala. served copy of each on C. U. Irvine, General Manager of Operations, Terminal Railway of The Alabama State Docks Department; and Terminal Railway of Alabama State Docks, etc.

J. L. May, United States Marshal.

W. F. Armstrong, Deputy United States Marshal.

Marshal's Fees

Travel	\$ .40
Service	2.00

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2.40

Filed Feb. 27, 1961.

Motion to Quash Return of Service of Summons or to Dismiss Action, Civil Action No. 2553;

Affidavit of C. U. Irvine, Civil Action No. 2553;

Affidavit of Ralph P. Eagerton, Civil Action No. 2553;

**Affidavit of William J. Colley, Civil Action No. 2553;**

**Affidavit of John Patterson, Civil Action No. 2553;**

**Order Granting Motion to Quash and Granting Motion to Dismiss Action, Civil Action No. 2553;**

**[fol. 93] Corrected Order, Civil Action No. 2553;**

**Notice of Appeal, Civil Action No. 2553;**

**Omitted from the Printed Record pursuant to Appellants' Designation as to Printing Record heretofore copied at page 1.**

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**IN UNITED STATES DISTRICT COURT**

**Civil Action No. 2588**

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**MRS. ELIZABETH W. WIGGINS and FRANK O. BURGE, JR.,**  
**who sue in their capacity as Administrators of the**  
**Estate of John Ervin Wiggins, deceased, Plaintiffs,**

**vs.**

**TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS,**  
**whose true and correct name and legal status is otherwise unknown to the plaintiffs, but who is the legal entity**  
**operating what was generally known as the Terminal**  
**Railway of the Alabama State Docks at Mobile, Alabama**  
**on November 14, 1958 and whose true and correct name**  
**and legal status will be added by amendment to the**  
**plaintiff's complaint when ascertained, Defendants.**

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**COMPLAINT—Filed April 19, 1961**

**Come the plaintiffs in the above styled cause and bring**  
**this action against the defendants Terminal Railway of**  
**the Alabama State Docks Department and Terminal Rail-**  
**[fol. 94] way of Alabama State Docks, whose true and**  
**correct name and legal status is otherwise unknown to**  
**the plaintiffs but who is the legal entity operating what**  
**was generally known as the Terminal Railway of the Ala-**



bama State Docks at Mobile, Alabama on November 14, 1958 and whose true and correct name and legal status will be added by amendment to plaintiffs' complaint when ascertained, and for cause of action against the said defendants, allege as follows:

### I.

1. That the plaintiffs, Mrs. Elizabeth W. Wiggins and Frank O. Burge, Jr., who sue in their capacity as Administrators of the estate of John Ervin Wiggins, deceased, are the personal representatives of the estate of the said John Ervin Wiggins, deceased, letters of administration upon the estate of the said deceased having been granted to the plaintiffs on the 8th day of December, 1960, by the Honorable J. Paul Meeks, Judge of the Probate Court of Jefferson County, Alabama.

### II.

1. That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are common carriers by railroad and as such common carriers by railroad have at all times herein mentioned been engaged in the business of operating a railroad for the transportation of freight for hire in commerce between the several states of the United States of America and in foreign commerce.

2. (a) That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are the only departments within the Government of the State of Alabama which operate solely from the money they make themselves.

(b) That the said defendants get no legislative appropriation, and

(c) That the said defendants operate as a self-sustaining business, generating their own funds.

### III.

1. That the jurisdiction of the United States District Court for the Southern Division of the Southern District

of Alabama is based upon (a) An Act of the Congress of the United States known as the Federal Employers Liability Act, Title 45, U.S.C.A. Section 51 et seq, and (b) Another Act of the Congress of the United States, namely, Title 45, U.S.C.A. Section 59.

#### IV.

1. That the defendants as such common carriers by railroad as described in Paragraph II, 1 of this complaint and their employees have at all times herein mentioned been subject to (a) The provisions of the aforesaid Federal Employers Liability Act, an Act of the Congress of the United States enacted for the protection and benefit of employees of common carriers by railroad engaged in such aforesaid interstate and foreign commerce who are injured or killed in line of duty and (b) The provisions of the aforesaid Title 45 U.S.C.A. Section 59.

[fol. 96]

#### V.

##### First Cause of Action.

For plaintiffs' first cause of action, plaintiffs adopt the allegations of Paragraphs I, II, III and IV of this complaint and add thereto the following allegations, viz.:

Plaintiffs aver that on, to-wit, November 14, 1958, plaintiffs' intestate, John Ervin Wiggins, deceased, was employed by the defendants as a railroad switchman at Mobile, Alabama and that a part of his duties as such railroad switchman for the defendants was in furtherance of such aforesaid interstate or foreign commerce or directly or closely and substantially affected such commerce and that on said date while plaintiffs' said intestate and other members of a switching crew of the defendants were engaged in moving several railroad cars with a switch engine of the defendants along Track C7 at the Alabama State Docks and while plaintiffs' said intestate was walking along a concrete platform beside said Tract C7 in the performance of his duties as such railroad switchman for the defendants, plaintiffs' said intestate fell into an unlighted opening or recess in said concrete platform beside

Tract C7, and plaintiffs' said intestate was thereby caused to be injured and damaged as follows: The bones in the right foot of plaintiffs' said intestate were broken and the ligaments, tendons, tissues, nerves and muscles thereof were torn and bruised and otherwise injured and the right foot of plaintiffs' said intestate was permanently injured and the use thereof permanently impaired and plaintiffs' said intestate was made sick and sore and caused to suffer great physical pain and mental anguish and he was caused [fol. 97] to incur expense for x-rays and medical and surgical care and treatment and he was caused to lose wages from his employment as a railroad switchman and his power and capacity to work and earn money in the future was permanently impaired; and plaintiffs aver that said injuries to plaintiffs' said intestate contributed to or hastened his death on to-wit December 13th 1939 and plaintiffs under and by virtue of the provisions of Title 45 U.S.C.A. Section 51 et seq. and the provisions of Title 45 U.S.C.A. Section 59, claim damages of the defendants for and on account of the aforesaid injuries and damages sustained by their said intestate and for the pecuniary loss sustained by Mrs. Elizabeth W. Wiggins, mother of the said John Ervin Wiggins by reason of the said injuries and death of her said son, the plaintiffs' said intestate having left no surviving widow or children, but having left a surviving mother, namely, Mrs. Elizabeth W. Wiggins, who was dependent upon her said son for support and maintenance at the time of his aforesaid injuries and death and for whose benefit this claim for damages is being maintained; and plaintiffs aver that their said intestate was caused to sustain all of his aforesaid injuries and damages and said injuries contributed to or hastened his death all as a proximate result, in whole or in part, of the negligence of the officers, agents or employees of the defendants while acting within the line and scope of their employment by the defendants or by reason of a defect or insufficiency due to the negligence of the defendants in their cars, engines, track, roadbed, works, machinery, appliances or other equipment.

[fol. 98]

## VI.

## Second Cause of Action.

For plaintiff's second cause of action, plaintiffs adopt the allegations of Paragraph V of this complaint except that in lieu of the following allegations in said Paragraph V, viz:

"And plaintiffs aver that their said intestate was caused to sustain all of his aforesaid injuries and damages and said injuries contributed to or hastened his death all as a proximate result, in whole or in part, of the negligence of the officers, agents or employees of the defendants while acting within the line and scope of their employment by the defendants or by reason of a defect or insufficiency due to the negligence of the defendants in their cars, engines, track, roadbed, works, machinery, appliances or other equipment."

plaintiffs insert the following allegations, viz:

"and plaintiffs aver that their said intestate was caused to sustain all of his aforesaid injuries and damages and said injuries contributed to or hastened his death, all as a proximate result, in whole or in part of the negligence of the defendants in that the defendants negligently failed to exercise reasonable care to furnish or maintain plaintiffs' said intestate a reasonably safe place to perform his aforesaid work for the defendants."

## VII.

Wherefore, plaintiffs pray judgment against the defendants under each of the aforesaid causes of action [fol. 99] in the amount of Twenty-five Thousand (\$25,000.00) Dollars.

## VIII.

Plaintiff demands a jury trial.

Rives, Peterson, Pettus & Conway, By Al G. Rives,  
Attorneys for Plaintiffs.

Tenth Floor, Massey Building, Birmingham 3, Alabama,  
Telephone ALpine 1-3275.

Note to United States Marshal:

Summons and complaint in this action should be served on Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, etc. by leaving a copy thereof with the Honorable Earl M. McGowin, Director of the said Terminal Railway of the Alabama State Docks Department.

[fol. 100]

IN UNITED STATES DISTRICT COURT

Civil Action File No. 2588

Received April 20, 1961.

MRS. ELIZABETH W. WIGGINS and FRANK O. BURGE, JR.,  
who sue in their capacity as Administrators of the  
Estate of John Ervin Wiggins, deceased, Plaintiff,

v.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT;  
and TERMINAL RAILWAY OF ALABAMA STATE DOCKS,  
Defendants.

SUMMONS—April 20, 1961

To the above named Defendant:

You are hereby summoned and required to serve upon Mr. Al G. Rives, Attorney, Rives, Peterson, Pettus & Conway, plaintiff's attorneys, whose address is: Tenth Floor, Massey Building, Birmingham 3, Alabama, an answer to the complaint which is herewith served upon you, within (twenty) 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

William J. O'Connor, Clerk of Court.

Minnie Pearl Cox, Deputy Clerk.

(Seal)

[Seal of Court]



[fol. 101] Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

**Return on Service of Writ.**

I hereby certify and return, that on the 20th day of April 1961, I received this summons and served it together with the complaint herein as follows: By handing a copy of each to Mr. C. U. Irvine, General Manager Of Operations, Alabama State Docks for Terminal Railway of the Alabama State Docks Department; and for Terminal Railway of Alabama State Docks at Alabama State Docks, Mobile, Alabama on April 25th, 1961.

J. L. May, United States Marshal, By G. V. Manley, Jr., Deputy United States Marshal.

Travel	\$ .30
Service	4.00

Filed Apr. 26, 1961.

Motion to Quash Return of Service of Summons, or to Dismiss Action, Civil Action No. 2588;

Affidavit of C. U. Irvine, Civil Action No. 2588;

Affidavit of Ralph P. Eagerton, Civil Action No. 2588;

Affidavit of William J. Colley, Civil Action No. 2588;

Affidavit of John Patterson, Civil Action No. 2588;

Order Granting Motion to Quash Service and Granting Motion to Dismiss, Civil Action No. 2588;

[fol. 102] Corrected Order, Civil Action No. 2588;

Notice of Appeal, Civil Action No. 2588;

Omitted from the Printed Record pursuant to Appellants' Designation as to Printing Record heretofore copied at page 1.

IN UNITED STATES DISTRICT COURT  
Civil Action No. 2679

AUDREY E. PRICE, Plaintiff,

VS.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on October 2, 1959 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, Defendants.

COMPLAINT—Filed September 7, 1961

Comes the plaintiff in the above styled cause and brings this action against the defendants Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, whose true and correct name and legal status is otherwise unknown to the plaintiff but who is the legal entity operating what was generally known as the Terminal Railway of the Alabama State Docks at Mobile, Alabama on October 2, 1959 and whose true and correct name and legal status will be added by amendment to plaintiff's complaint when ascertained, and for cause of action against the said defendants, alleges as follows:

I.

1. That the plaintiff Aubrey E. Price is a resident and citizen of Mobile County in the State of Alabama his address being 2410 Drake Street, Mobile, Alabama.

## II.

1. That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are common carriers by railroad and as such common carriers by railroad have at all times herein mentioned been engaged in the business of operating a railroad for the transportation of freight for hire in commerce between the several states of the United States of America and in foreign commerce.

2. (a) That the said Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks are the only departments within the Government of the State of Alabama which operate solely from the money they make themselves.

(b) That the said defendants get no legislative appropriation, and

[fol. 104] (c) That the said defendants operate as a self-sustaining business, generating their own funds.

## III.

1. That the jurisdiction of the United States District Court for the Southern Division of the Southern District of Alabama is based upon (a) An Act of the Congress of the United States known as the Federal Employers Liability Act, Title 45, U.S.C.A. Section 51 et seq. and (b) Another Act of the Congress of the United States known as one of the Federal Safety Appliance Acts and generally referred to as the Hand Brake Act, namely, Title 45, U.S.C.A. Section II.

## IV.

1. That the defendants as such common carriers by railroad as described in Paragraph II, 1 of this complaint and their employees have at all times herein mentioned been subject to (a) The provisions of the aforesaid Federal Employers Liability Act, an Act of the Congress of the United States enacted for the protection and benefit of employees of common carriers by railroad

engaged in such aforesaid interstate and foreign commerce who are injured or killed in line of duty and (b) The provisions of the aforesaid Federal Safety Appliance Act.

## V.

### First Cause of Action

For plaintiff's first cause of action, plaintiff adopts the allegations of Paragraphs I, II, III and IV of this complaint [fol. 105] and adds thereto the following allegations, viz:

Plaintiff avers that on, to-wit, October 2, 1959 plaintiff was employed by the defendants as a railroad switchman at Mobile, Alabama and that a part of plaintiff's duties as such railroad switchman for the defendants was in furtherance of such aforesaid interstate or foreign commerce or directly or closely and substantially affected such commerce and that on said date while plaintiff was attempting to operate a hand brake on a railroad boxcar on Pier B7 of the Alabama State Docks, he was caused to be injured and damaged as follows: Plaintiff's back was wrenched, strained, sprained and twisted and the ligaments, muscles and tissues of plaintiff's back were stretched, torn and otherwise injured and plaintiff was injured internally and made sick and sore and caused to suffer great physical pain and mental and he will be caused to suffer great physical pain and mental anguish in the future and plaintiff's nerves and nervous system were shocked and impaired and plaintiff was caused to be hospitalized and caused to undergo medical care and treatment and caused to incur expense for medical care and treatment and for hospitalization and caused to lose wages from his employment and plaintiff's power and capacity to work and earn money in the future has been impaired; and plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the defendants' hauling or permitting to be hauled or used on its line of railroad the aforesaid railroad boxcar that was equipped with an inefficient hand brake and in violation of

the aforesaid Federal Safety Appliance Act known as the Hand Brake Act, Title 45, U.S.C.A. Section II.

[fol. 106]

## VI.

### Second Cause of Action

For plaintiff's second cause of action, the plaintiff adopts the allegations of Paragraph V of this complaint except that in lieu of the following allegations in said Paragraph V, viz:

"and plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the defendants' hauling or permitting to be hauled or used on its line of railroad the aforesaid railroad boxcar that was equipped with an inefficient hand brake and in violation of the aforesaid Federal Safety Appliance Act known as the Hand Brake Act, Title 45, U.S.C.A. Section II."

plaintiff inserts the following allegations, viz:

"and plaintiff avers that he was caused to sustain all of his aforesaid injuries and damages as a proximate result, in whole or in part, of the negligence of the officers, agents or employees of the defendants while acting within the line and scope of their employment by the defendants or by reason of a defect or insufficiency due to the negligence of the defendants in their aforesaid railroad boxcar or its appliances."

## VII.

Wherefore, plaintiff prays judgment against the defendants under each of the aforesaid causes of action in the amount of Five Thousand (\$5,000.00) Dollars less a credit of \$381.28 heretofore paid to the plaintiff by the defendants on account of lost time from work between October 2, 1959 and November 9, 1959 on account of the aforesaid injury.



## VIII.

Plaintiff demands a jury trial.

Rives, Peterson, Pettus & Conway, By Al G. Rives,  
Attorneys for Plaintiff.

Tenth Floor, Massey Building, Birmingham 3, Alabama,  
Telephone ALpine 1-3275.

Note to United States Marshal:

Summons and complaint in this action should be served on Terminal Railway of the Alabama State Docks Department and Terminal Railway of Alabama State Docks, etc. by leaving a copy thereof with the Honorable Earl M. McGowin, Director of the said Terminal Railway of the Alabama State Docks Department.

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[fol. 108] IN UNITED STATES DISTRICT COURT  
Civil Action File No. 2679

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AUDREY E. PRICE, Plaintiff,

V.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT; and TERMINAL RAILWAY OF ALABAMA STATE DOCKS, ETC., Defendants.

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SUMMONS—September 8, 1961

To the above named Defendants:

You are hereby summoned and required to serve upon Mr. Al G. Rives, Attorney, Rives, Peterson, Pettus & Conway, plaintiff's attorneys, whose address is: Tenth Floor, Massey Building, Birmingham 3, Alabama, an answer to the complaint which is herewith served upon you, within (twenty) 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judg-

ment by default will be taken against you for the relief demanded in the complaint.

William J. O'Connor, Clerk of Court.  
Minnie Pearl Cox, Deputy Clerk.

(Seal)

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 109] Return of Service of Writ

I hereby certify and return, that on the 11th day of September, 1961, I received this summons and served it together with the complaint herein as follows: On September 13th, 1961 at Ala. State Docks, Mobile, Ala. I served copies of each on Mr. C. U. Irvine, Superintendent of Terminal Railway Of The Alabama State Docks Department, and Terminal Railway Of Alabama State Docks.

George M. Stuart, United States Marshal, By W. F. Armstrong, Deputy United States Marshal.

Marshal's Fees

Travel	\$ .40
Service	\$4.00
	<hr/>
	\$4.40

Filed Sep. 14, 1961.

Motion to Quash Return of Service of Summons or to Dismiss Action, Civil Action No. 2679;

Affidavit of C. U. Irvine, Civil Action No. 2679;

Affidavit of Ralph P. Eagerton, Civil Action No. 2679;

Affidavit of William J. Colley, Civil Action No. 2679;

Affidavit of John Patterson, Civil Action No. 2679;

[fol. 110] Order Granting Motion to Quash Service and Granting Motion to Dismiss Action, Civil Action No. 2679;

Corrected Order, Civil Action No. 2679;

Notice of Appeal, Civil Action No. 2679;

Omitted from the ~~Printed~~ Record pursuant to Appellants' Designation as to Printing Record heretofore copied at page 1.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—

Filed January 31, 1962

Come the appellants in the above styled causes, separately and severally, and hereby designate the following record, proceedings and evidence to be contained in the record on appeal in these actions:

1. The complaint and summons issued in each of the five cases, together with the return of the Marshal with respect to service of same.

2. The motion to quash return of service of summons or to dismiss action filed in each of the five actions.

3. Affidavits of Honorable John Patterson, William J. Colley, Ralph P. Eagerton and C. U. Urvine, filed in each of said actions in support of the motion to quash return of summons or to dismiss the action.

[fol. 111] 4. Depositions of Earl M. McGowin and C. U. Urvine together with all exhibits thereto.

5. Orders entered on the 29th day of December, 1961, in each of these actions, whereby each of the actions was dismissed, and the return of service of summons in each of said actions was quashed.

6. Corrected orders entered in each of these actions on the 22nd day of January, 1962, whereby the orders entered on the 29th day of December, 1961, were revised or corrected.

7. Notice of appeal filed in each of these actions.

8. Motion to consolidate the five cases on appeal.

9. Order entered January 29, 1962, consolidating cases on appeal.

10. This designation.

Al G. Rives, T. M. Conway, Jr., and Rives, Peterson, Pettus & Conway, By T. M. Conway, Jr., Attorneys for Plaintiffs.

[fol. 112] IN UNITED STATES DISTRICT COURT

ORDER CERTIFYING ORIGINAL DEPOSITIONS OF EARL M. McGOWIN AND C. U. IRVINE UP TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT—February 1, 1962

For cause shown,

It Is Ordered by the Court that the original depositions of Mr. Earl M. McGowin and Mr. C. U. Irvine be forwarded to the United States Court of Appeals for the Fifth Circuit, for examination by said Court in connection with the appeal herein and the Clerk of that Court is directed to return said depositions to the Clerk of this Court upon the conclusion of the appeal.

Made at Mobile, Alabama, this the 1st day of February A. D., 1962.

Daniel H. Thomas, United States District Judge.

U. S. District Court, Sou. Dist. Ala.

Filed and Entered this the 1st day of February, 1962, Minute Entry No. 9930.

William J. O'Connor, Clerk, By John V. O'Brien, Deputy Clerk.

[fol. 113] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 114] IN UNITED STATES COURT OF APPEALS

No. 19519

R. B. PARDEN, et al.;

versus

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—  
October 16, 1962

On this day this cause was called, and after argument  
by T. M. Conway, Esq., for appellants and by Willis C.  
Darby, Jr., Esq., for appellees was submitted to the Court.

[fol. 115]

Corrected.

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19519

R. B. PARDEN, et al., Appellants,  
versus

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF ALABAMA

OPINION—January 3, 1963

Before RIVES, CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: This appeal involves the question whether the State of Alabama may be sued by its



citizen in a District Court of the United States on a claim based upon the Federal Employers Liability Act<sup>1</sup> for damages [fol. 116] for personal injuries sustained by its citizen while employed by a railroad belonging to the State of Alabama which was operated as a common carrier in interstate commerce and while he was so engaged. The action<sup>2</sup> was brought against Terminal Railway, Alabama State Docks; and the sovereign State of Alabama, entering its appearance specially, moved to quash the return of summons on it or to dismiss the action, on the grounds that the Terminal Railway was an agency of the State, that the State had not consented to be sued or waived its immunity, and that the judicial power of the United States

<sup>1</sup> Title 45 U.S.C.A. § 51:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury of death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or any insufficiency, due to its negligence, in its cars, engines, appliances, machinery . . . or other equipment."

Concurrent jurisdiction of actions under the statute is conferred by 45 U.S.C.A. § 56 in state and federal courts.

<sup>2</sup> Besides the action brought by R. B. Parden for personal injuries sustained July 13, 1958, four other actions were brought which involve the same jurisdictional facts as Parden's claim, varying only in the details of the facts as to liability and the injuries received. These four are: a second action filed by Parden for personal injuries sustained June 3, 1958; action by Otto Driskell alleging two injuries received by him on July 22, 1958; action by Mrs. Elizabeth W. Wiggins and Frank E. Burge, Jr., Administrators of the estate of John Irvine Wiggins, deceased, based on claims for two injuries received by him November 15, 1958 contributing to his death; and action by Aubrey E. Price claiming two separate personal injuries occurring Oct. 2, 1959, one based upon the Federal Employers Liability Act and the second upon the Federal Safety Appliance Act, 45 U.S.C.A. § 2. The several actions were consolidated for trial in the court below and for purposes of this appeal.

The first action of R. B. Parden will be discussed in most instances, but everything herein said will have reference also to the other four civil actions.

did not extend to this controversy because it is between a citizen of Alabama and the State of Alabama. Both motions were heard on the face of the pleadings supplemented by four affidavits and two depositions and were [fol. 117] granted by the court below in an order stating:

"It is Ordered by the Court that the motion of the Sovereign State of Alabama to quash return of service of summons be, and the same hereby is, Granted, and

"It is Further Ordered by the Court that the motion of the Sovereign State of Alabama to dismiss the action be, and the same hereby is, Granted, with costs herein taxed against the Plaintiff."

The parties do not contend on appeal that there is any dispute about the facts, but agree that the case presents only questions of law. The basic facts are here set forth and others will be adverted to in our discussion of the several arguments:

The Terminal Railway was and is wholly owned and operated by the State of Alabama, consists of about fifty miles of railroad tracks in the area adjacent to the Alabama State Docks at Mobile, Alabama, serving in addition several industries situated in the general vicinity, and operating an interchange railroad with Alabama, Tennessee and Northern Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, and Gulf, Mobile and Ohio Railroad Company. A large percent of its operations are in interstate commerce; and it has contracts and working agreements with the various railroad brotherhoods, and makes reports to the Interstate Commerce Commission concerning injuries sustained by its employees, and keeps its accounts so as to comply with the regulations of the Interstate Commerce Commission.

Appellant Parden argues that the owner of every common carrier by railroad engaging in interstate commerce is liable for injuries to its employees so engaged under the clear and all-embracing language of the F.E.L.A. quoted

in footnote 1, *supra*,<sup>3</sup> that the State of Alabama is so liable because it operates this railroad under constitutional amendment<sup>4</sup> and statute;<sup>5</sup> and that, under the Commerce Clause of The United States Constitution and three Supreme Court cases hereinafter considered, it is subject to and liable under F.E.L.A. and the Safety Appliance Act to the same extent as an individual.

Alabama counters with the contention that the whole sum of the judicial power granted by the Constitution to the central government does not embrace any authority in its courts to entertain a suit brought by a citizen against his own State; and that the State of Alabama has not waived its immunity from suit. The appellant responds by asserting that the general principles relied upon by the State do not apply where the State is deemed to have consented to suit; and that, since Alabama is not protected by the Eleventh Amendment to the Constitution, it is deemed to have consented by the mere fact that it entered into and conducted the operation of an interstate railroad under the statutory and organic law of the State.<sup>6</sup>

We do not agree that the State of Alabama, by the mere fact that it legally operated an interstate carrier, sur-

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<sup>3</sup> And under the Federal Safety Appliance Act, Title 45, U.S.C.A. § 2, as to one of the civil actions now before us.

<sup>4</sup> Alabama Constitution 1901, Amendments 12 and 116.

<sup>5</sup> 1940 Code of Alabama (Recompiled, 1958) Title 38, §§ 17 and 45 (14, 16).

<sup>6</sup> Appellant's position is well epitomized in the following excerpts from its reply brief:

"None of the authorities cited under this subdivision of the opposing argument hold that the judicial power of the United States does not embrace the authority to entertain a suit brought by a citizen against his own state, where the State has consented to such suit. . . .

"We urge that it is a sound construction of the Federal Employers Liability Act, when considered in the light of Supreme Court decisions concerning the Safety Appliance Acts and the Railway Labor Act, that Congress has prohibited any entity, state or private, from engaging in business as an interstate common carrier railroad, without consenting to be sued

rendered its right not to be sued, which belongs to the Union and all the States in it, except as explicitly provided otherwise in the Constitution. It is conceded that Alabama could not be sued by a citizen of another State seeking to assert the identical right claimed here. This, the appellant conceives to be a protection vouchsafed by the Eleventh Amendment which, it says, Alabama does not possess when it is sued by its own citizen. We think this attitude arises from a misunderstanding of the effect of the Eleventh Amendment and of the status of the States of the Union independent of it. This is made clear by a brief consideration of the history of the Amendment as developed in decisions of the Supreme Court.

[fol. 120] Almost before the ink had dried on the signatures to the Constitution, a citizen of South Carolina filed suit against the State of Georgia in the Supreme Court of the United States asserting jurisdiction under Article III, Section 2, Clause 1 of the Constitution.<sup>7</sup> The Supreme Court<sup>8</sup> upheld the claimed right in a decision whose essence the syllabus sums up in these words: "A State may be sued, in the Supreme Court, by an individual citizen of another State . . ."

The people, who had just adopted a Constitution which delegated certain powers to the central government, did not agree with this construction of what they had written; and they promptly adopted the Eleventh Amendment: "The Judicial power of the United States *shall not be construed*

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in a United States District Court under the Federal Employers Liability Act. . . .

"As we see it, if the Constitution of the State of Alabama authorizes the operation of this railroad, then it is subject to all the provisions of the Federal Employers Liability Act. Liability under the Act can be avoided only if the State is acting unconstitutionally by operating the Terminal Railway of Alabama State Docks."

<sup>7</sup> "The judicial Power shall extend . . . to controversies . . . between a State and Citizens of another State; . . . and between a State . . . and foreign States, Citizens or Subjects." [Emphasis added.]

<sup>8</sup> *Chisolm, Executor v. Georgia*, 1793, 2 U.S. 419.

to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." [Emphasis supplied.]

The Amendment dealt solely with the prepositional phrases—"between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects"—being cast in the precise words of those phrases. And it dealt with the *construction* of those phrases only, stating without equivocation that the grant of power was not to be construed as authorizing a citizen or subject to sue another State. It directed simply that no court considering that phrase should have the power to construe [fol. 121] it other than as directed by the Eleventh Amendment. The Amendment did not add anything to the Constitution and did not take anything from it. It simply gave directions as to the meaning of a phrase already in the Constitution. It was definitely a limitation on the right of any court to construe that language of the Constitution in such a way as to diminish the immunity from suit which is an essential and universal attribute of sovereignty.

It was not necessary that the Amendment negate the right of a citizen to sue his own State because Article III of the Constitution, which alone deals with the federal Judiciary and defines the judicial power being delegated to the central government, nowhere mentions or hints at a case or controversy between a State and its own citizens as being justiciable by any court. As against its own citizens, therefore, a State did not need and has never needed the shelter or protection of the Eleventh Amendment.

It was almost a century after *Chisholm v. Georgia* and the Eleventh Amendment before the Supreme Court was faced with a suit brought by a citizen against his own State, *Hans v. Louisiana*, 1890, 134 U. S. 1. Jurisdiction in the Circuit Court was claimed under Article III of the Constitution, which declares that "The Judicial Power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made . . .," and the Act of March 3, 1875, 18 Stat. 470, c. 137, §1, now 28 U.S.C.A. §1331 (a),



vesting in the Circuit Courts jurisdiction "of all suits of a civil nature at common law or in equity, arising under the Constitution or laws of the United States, or treaties [fol. 122] made . . ." The lower court dismissed the suit and the Supreme Court affirmed without a dissent.

The opinion analyzes thoroughly the decision in *Chisólm v. Georgia*, the Eleventh Amendment, and the debates among the writers of the Constitution, and, in addition, those between Mason and Patrick Henry on one side and Madison and Marshall on the other, in the Virginia Convention. It quotes from Madison: "Its jurisdiction [the Federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court"; and from Marshall: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the Federal Court . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . ." And it characterizes the contention that the passage of the Eleventh Amendment had the effect of leaving a State open to suit by its own citizens in cases arising under the Constitution or laws of the United States as " . . . supposition . . . almost an absurdity on its face." [Pp. 14 and 15.]

After quoting from a statement by Chief Justice Taney in *Beers et al. v. Arkansas*, 20 Howard 527, 530: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, [fol. 123] or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on

which it consents to be sued . . ."; the opinion states its conclusion thus:

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence . . ."

This decision in *Hans v. Louisiana* has been cited as authority by the Supreme Court in approximately thirty cases.\*

This line of cases constitutes a continuing affirmation by the Court of the basic principle that the federal judicial system is one of enumerated powers, not of enumerated limitations upon power. The lack of power in the court below, therefore, to entertain a suit by the individual against the State is not dependent upon the negative language of the Eleventh Amendment, which merely points out that such power is not given, but on the basic fact that such power is not lodged in the federal judiciary under our constitutional system.

[fol. 124] It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State.

The *Ford Motor Company* case, *supra*, stands for the well settled rule that waiver by a State of its sovereign immunity must be clearly shown, and that whether such a waiver has been established presents a question to be decided

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\* E.g., *Ford Motor Co. v. Dept. of Treas. of Indiana*, 323 U.S. 459, 464; *Great Northern Ins. Co. v. Read Ins. Comm.*, 1944, 322 U.S. 47, 51; *Monaco v. Mississippi*, 1934, 292 U. S. 313, 322; *Williams v. United States*, 1933, 289 U.S. 553, 575; *Ex parte State of New York*, 1921, 256 U. S. 490, 497; *Duhne v. New Jersey*, 1920, 251 U. S. 314, 313; *Palmer v. Ohio*, 1918, 248 U.S. 32, 34; *Ex parte Young*, 1908, 209 U.S. 123, 150.

under State law (pp. 466-470). And cf. *Louisiana Land and Exploration Co. v. State Mineral Board*, 5 Cir., 1956, 229 F. 2d 5, certiorari denied, 351 U. S. 975.

The Supreme Court of Alabama considered the provisions of the Alabama Constitution and statutes involved in the case before us in *State Docks Commission v. Barnes*, 1932, 143 So. 581. It was there decided that a claim for the death of one of the employees of the State Docks Commission was a claim against the State, which was "performing a business or corporate power and not a governmental function." Continuing, the court said (page 582):

"But Section 14 of the Bill of Rights of the Alabama Constitution provides that the State shall never be made a defendant in any court of law or equity. The State cannot consent to such a suit. This means not only that the State itself may not be sued, but that this cannot be indirectly accomplished by suing its officers or agents in their official capacity, when a [fol. 125] result favorable to plaintiff would be directly to affect the financial status of the State treasury . . ."

"The right to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers v. Arkansas*, 20 Howard 527; *Railroad Company v. Tennessee*, 101 U. S. 337; *Hans v. Louisiana*, 134 U. S. 1." So says the Supreme Court in *Palmer et al. v. State of Ohio*, 1918, 248 U. S. 32. And it is not contended that Alabama has given its express consent, but, on the contrary, its Supreme Court has held that it cannot so consent.

It is pertinent to mention that the State of Alabama has provided payment for injury to or death of any employee of the agency here involved "where in law, justice or good morals the same should be paid;" and that the remedy so provided is characterized by the Supreme Court as "a workmen's compensation law for State employees," *State Board of Adjustment v. Lacks*, 1945, 22 So. 2d 377; and cf. *Hawkins v. State Board of Adjustment*, S. Ct. Ala., 1942, 7 So. 2d 775.

It remains but to consider the three Supreme Court cases upon which appellant bases his chief reliance. The appellant frankly points out that none of the cases are applicable on their facts, but contends that some of the language found in the opinions warrants the assumption that, by operation of law, Alabama necessarily waived its immunity from suit by electing to operate a common carrier engaged in interstate commerce. The language of each of the cases is, of course, limited to the facts with which the Court was dealing.

[fol. 126] In *United States v. California*, 1936, 297 U. S. 175, it was claimed that § 6 of the Safety Appliance Act vested jurisdiction in the district court to entertain the suit by the United States for a statutory penalty imposed for violation of the Act. The application of the decision of the Supreme Court in that case, insofar as it has possible relation to the question before us, is thus pinpointed at page 187:

"Article III, § 2 of the Constitution extends the judicial power of the United States and the original jurisdiction of the Supreme Court to cases 'in which a State shall be a party.' . . . But Congress may confer on inferior courts concurrent original jurisdiction of such suits. . . . Section 233 of the Judicial Code, 28 U.S.C., 341 . . . gives to this Court 'exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens or between a State and citizens of other States or aliens.'"

The Court then goes on to decide that the later enacted § 6 of the Safety Appliance Act provides that the penalty which it imposes supersedes, for practical reasons, the provisions of the Judicial Code and, therefore, vests in the district court jurisdiction to recover the penalty against the State. The power to maintain the suit against the State is specifically vested by the Constitution in the United States. The case does not hint that an individual in whom the Constitution does not vest such a power could maintain such a suit against a State.

The action in *California v. Taylor, et al.*, 1957, 353 U. S. 553, was brought by five employees of the State Belt Railroad [fol. 127] operated by the Board of State Harbor Commissioners of California against the ten members of the National Railroad Adjustment Board, First Division, and its Executive Secretary. The United States, answering on behalf of the Board, supported the charges in the complaint that the Belt Road was governed by the Railway Labor Act of 1926 rather than by the Civil Service Laws of the State of California. The State of California intervened as a party defendant and opposed the claim of the employees of the Belt Railroad in which they sought to invoke the machinery of the Railway Labor Act. The Supreme Court held that the operation of the Belt Railroad was covered by the Railway Labor Act, and referred to the fact that several State courts, including an intermediate appellate court of California,<sup>10</sup> had held state owned belt railroads such as the ones here involved subject to the Federal Employers Liability Act. Following its decision in *United States v. California*, supra, the Supreme Court held that Congress had the right to regulate the California Belt Railroad's employment relationships. In Note 16, page 568, however, the Supreme Court stated:

"The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Labor Relations Board in a suit against the State in a United States District Court under §3, First (p) of the Act is not before us under the facts of this case."

This statement by the Supreme Court disposes of the contention of the appellants that this case is authority for the contention that Alabama had waived its immunity from suit.

*Petty v. Tennessee-Missouri Bridge Commission*, 1959, 359 U. S. 275, involved the question whether Tennessee and Missouri had waived their immunity to be sued when those States entered into a compact, with Congressional

<sup>10</sup> *Maurice v. State, Dist. Ct. App., Cal.*, 1941, 110 P. 2d 706.



approval, for the construction of a bridge over the Mississippi River. To build and manage the bridge, there was created the Tennessee-Missouri Bridge Commission, a "body corporate and politic," wherein it was provided that the Commission had the power "to contract, to sue and be sued in its own name." The Court, after noting that "The conclusion that there has been a waiver of immunity will not be lightly inferred, *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 171," decided that, under the facts of that case and "where the waiver is, as here, claimed to arise from a compact between several States," the Commission was suable under the sue-and-be-sued clause interpreted in the light of the conditions attached by Congress in approving the bridge over the navigable stream.<sup>11</sup> We think that the case is not authority for the waiver claimed here, and refer to the language used by this Court in *Mc* [fol. 129] *Dermott & Co. v. Department of Highways, State of Louisiana*.<sup>12</sup>

<sup>11</sup> In a footnote, Mr. Justice Frankfurter, dissenting (page 289), stated the following:

"Suit in *United States v. California*, 297 U.S. 175, was instituted by the United States, and jurisdiction over such an action is not within the proscription of the Eleventh Amendment. In *California v. Taylor*, 353 U. S. 553, the State intervened in an action brought against the National Railroad Adjustment Board, hence voluntarily submitted itself to the jurisdiction of the federal courts."

<sup>12</sup> 5 Cir., 1959, 267 F. 2d 317, 318.

"Appellee, in its turn, citing, as settling the law to the contrary of this contention, other cases and *Petty v. Tenn.-Mo. Bridge Comm.*, 8 Cir., 254 F. 2d 857, reversed (three judges dissenting) in *Petty v. Tenn.-Mo. Bridge Comm.*, 358 U.S. 811 . . . not in principle but on the sole ground that the Act of Congress approving the interstate compact had made provision for the suit there brought, urges upon us that the judgment must be affirmed.

"This Court in a case involving a collision with a bridge in Broward County, Florida [*Broward County, Florida v. Wickman*, 5 Cir., 195 F. 2d 614], has settled it for this Circuit, as the Supreme Court in *Ex parte, State of New York*, 356 U. S. 490, . . . has for the country as a whole, that 'the immunity of a State from a suit in personam in the admiralty brought by a private person without its consent is clear.'"

Based upon the authorities cited and the foregoing reasons; we hold that the State of Alabama is constitutionally immune from suit under the facts before us and that there has been no waiver of this immunity. The judgments entered in the captioned case and the others consolidated with it by order of the court below are

—  
AFFIRMED.

BROWN, Circuit Judge, concurring specially:

I concur in the result and in much of the Court's opinion.

But in at least two places the Court states that "the State of Alabama is constitutionally immune from suit." — F. [fol. 130] 2d —.<sup>1</sup> Apart from the Eleventh Amendment, I find nothing in the Constitution nor in the elaborate structure of the opinion in *Hans v. Louisiana*, 1890, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842, to support that conclusion as a matter of federal constitutional law. Sovereign immunity, threadbare as it generally is, is recognized in law. It may, as it does here, deny effectual enforcement to a clear legal right. But that does not raise this notion to the stature of a federal constitutional right.

Moreover, I think the constitutional crisis generated by *Chisholm v. Georgia*, 1792, 2 U. S. 2 Dall 419, 1 L. Ed. 440, refutes this Court's thesis that when it was all said and done the Eleventh Amendment " . . . did not add anything to the Constitution and did not take anything from it." — F. 2d —. And to the extent that *Hans v. Louisiana* really puts the result on the basis of the traditional immunity of a State, rather than on the obvious implications of the Eleventh Amendment, it seems clear to me that the Supreme Court did not undertake to cast it,<sup>2</sup> as does

<sup>1</sup> See also: "It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State." — F. 2d —.

<sup>2</sup> The strongest statement in *Hans* in this direction is: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Con-

[fol. 131] this Court, in terms of a Constitution of enumerated powers and the "basic fact that such power is not lodged in the federal judiciary under our constitutional system." — F. 2d —. This latter would, among other things, mean that *jurisdiction* would be conferred by consent (of the sovereign waiving its immunity). This certainly contradicts a basic concept of a limited federal jurisdiction.

What the case presents is the anomaly of a clear legal right without any means of effectual enforcement. Without a doubt, Alabama and its operating agencies, the Terminal Railway and Docks Department are subject to the FELA. It is even likely that its scheme of vicarious workmen's compensation constitutes an outright violation of the Act which prohibits any contract, rule, regulation or device to enable a common carrier to exempt itself from the liabilities imposed.<sup>3</sup>

But clear as is the legal right, invalid as is the substitute compensation program, neither in the FELA nor in the

stitution when establishing the judicial power of the United States." 134 U. S. 1, 15.

The Court speaks again in terms of suits unknown to or forbidden by law in *Fitts v. McGhee*, 1899, 172 U. S. 516, 524, 19 S. Ct. 269, 43 L. Ed. 535.

"Is this a suit against the state of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a state by citizens of such state. But it has been adjudged by this court upon full consideration that a suit against a state by one of its own citizens, the state not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a state by citizens of another state of the Union, or by citizens or subjects of foreign states. *Hans v. Louisiana*, 134 U. S. 1, 10, 15 [33:842, 845, 847]; *North Carolina v. Temple*, 134 U. S. 22 [33:849]. It is therefore an immaterial circumstance in the present case that the plaintiffs do not appear to be citizens of another state than Alabama, and may be citizens of that state."

<sup>3</sup> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void \* \* \*." 45 USCA § 55.

Alabama statutes prescribing the physical operation of this [fol. 132] interstate carrier is there enough material out of which to extract even the faintest notion of a waiver of that traditional immunity which Alabama painstakingly has additionally preserved by its own express constitutional provision.

The suit therefore must fall. But we should not by our discussion couched in language of a *constitutional* immunity apart from the Eleventh Amendment foreclose remedial action by Congress or, perhaps, judicial relief in its own courts at the hands of agencies of the United States Government whose statutory policy may not be thwarted by this plea.

[fol. 133]

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IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,519

---

D. C. Docket Nos. 2551, 2552, 2553, 2588, 2697 Civil.

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R. B. PARDEN, et al., Appellants,

versus

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al., Appellees.

---

Appeals from the United States District Court for the  
Southern District of Alabama

---

Before Rives, Cameron and Brown, Circuit Judges.

JUDGMENT—January 3, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgments entered

in the captioned case and the others consolidated with it by order of the court below be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellants, R. B. Parden, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, Concurs Specially" January 3, 1963.

Issued as Mandate: Mar 20 1963

[fol. 134] Petition for Rehearing and Brief in Support covering 12 pages filed January 23, 1963, omitted from this print. It was denied, and nothing more by order, February 27, 1963.

[fol. 144]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19519

R. B. PARDEN, et al., Appellants,

v.

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al., Appellees.

Appeals from the United States District Court for the  
Southern District of Alabama

ORDER DENYING PETITION FOR REHEARING—  
February 27, 1963

Before RIVES, CAMERON and BROWN, Circuit Judges.

Per Curiam.

It Is Ordered that appellants' petition for rehearing be, and it is hereby Denied.



[fol. 145] Clerk's Certificate to foregoing transcript  
(omitted in printing).

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[fol. 146]

SUPREME COURT OF THE UNITED STATES

No. 157, October Term, 1963

---

R. B. PARDEN, et al.,

Petitioners,

vs.

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, et al.

---

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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MAY 24 1963

JOHN F. DAVIS, CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1962 <sup>3</sup>

No.  157

R. B. PARDEN, OTTO DRISKELL, MRS. ELIZABETH  
W. WIGGINS AND FRANK O. BURGE, JR., Suing in  
Their Capacity as Administrators of the Estate of JOHN  
ERVIN WIGGINS, Deceased, and AUBREY E. PRICE,  
*Petitioners,*

VS.

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT ET AL.,  
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI**

TO THE UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT.

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## CASES CITED

<i>California v. Taylor</i> , 353 U.S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037	7, 10
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## CONSTITUTIONS AND STATUTES

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1962.**

**No. \_\_\_\_\_**

**R. B. PARDEN, OTTO DRISKELL, MRS. ELIZABETH  
W. WIGGINS AND FRANK O. BURGE, JR., Suing in  
Their Capacity as Administrators of the Estate of JOHN  
ERVIN WIGGINS, Deceased, and AUBREY E. PRICE,  
*Petitioners,***

**vs.**

**TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT ET AL.,  
*Respondents.***

**. PETITION FOR A WRIT OF CERTIORARI**

**TO THE UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT.**

Petitioners pray that a Writ of Certiorari issue to review the adverse judgments entered in their separate but consolidated cases by the United States Court of Appeals for the Fifth Circuit, whereby it affirmed final judgments of dismissal of petitioners' suits in the United States District Court for the Southern Division of Alabama.



## A.

**REPORT OF OPINION DELIVERED IN COURT BELOW.**

The opinion of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed is reported as *Parden v. Terminal Railway of the Alabama State Docks Department*, 311 F.2d 727 (1963), and a copy of said opinion, together with a copy of the judgment and a copy of the order overruling petitioners' application for rehearing is appended hereto, pages A1 through A19, pursuant to Rule 23 (1) (i).

## B.

**JURISDICTION OF THIS COURT.**

Jurisdiction of this Court is invoked on the following basis:

1. The judgment entry of the United States Court of Appeals for the Fifth Circuit adverse to petitioners was made on January 3, 1963.

2. The order of the United States Court of Appeals overruling the application of petitioners for a rehearing in said Court was entered on February 27, 1963.

3. Jurisdiction to review the judgment or decree in question by Writ of Certiorari is conferred on this Court by virtue of Title 28, U.S.C.A., Section 1254(1):

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

"(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

## C.

**QUESTIONS PRESENTED FOR REVIEW.**

The questions presented for review by this petition may be stated as follows:

1. Is an employee of an interstate common carrier railroad to be deprived of his remedy of suit for personal injuries under the Federal Employers Liability Act in a United States District Court because the railroad is owned and operated by the State of Alabama, of which the employee is a citizen, which state invokes a claim of immunity from such suits?

2. Whether the State of Alabama, admittedly engaged in the business of operating a common carrier railroad in interstate and foreign commerce, is amenable to suit in a United States District Court by its citizen-employees to recover damages under the Federal Employers Liability Act and/or the Federal Safety Appliance Acts for injuries sustained in line of duty.

## D.

**CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.**

Several statutes and constitutional provisions are involved, and as they are lengthy for the most part, citations alone will be inserted at this point and the texts of same are set forth in the appendix.

45 U.S.C.A., §51.

45 U.S.C.A., §56.

45 U.S.C.A., §1.

45 U.S.C.A., §2.

Alabama Constitution of 1901, Amendment No. 12  
(Mobile Port Amendment).

Alabama Constitution of 1901, Amendment No. 116.  
1940 Code of Alabama (Recompiled, 1958), Title 38,  
§17.  
1940 Code of Alabama (Recompiled, 1958), Title 38,  
§45 (14, 16).  
United States Constitution, Art. One, Section 8, cl. 3  
(Commerce Power).

**E.**

**STATEMENT OF THE CASE.**

Petitioners, citizens of Alabama, were plaintiffs in separate suits filed in the United States District Court for the Southern District of Alabama, all of which were brought against the Terminal Railway of the Alabama State Docks Department, an agency of the State of Alabama, which admittedly is a common carrier railroad for hire doing business in interstate commerce between the several states and between the United States and foreign countries. All sought damages under the Federal Employers Liability Act on account of injuries sustained by employees of Terminal Railway while engaged in their employment with Terminal Railway and while engaged in such interstate commerce. (R. 5-13)

Jurisdiction of the United States District Court was based upon the Federal Employers Liability Act, 45 U.S.C.A., §51, et seq., and particularly Section 6 thereof, 45 U.S.C.A., §56, which authorizes commencement of suits under the FELA in District Courts of the United States.

In each of such actions, the State of Alabama appeared specially and moved to dismiss the suits on the ground that the Terminal Railway is an agency of the State of Alabama, and the State of Alabama could not be sued on these causes of action in the United States District Court. (R.

15-17) In response to such motions to dismiss, the District Court dismissed all five suits (R. 72-73), and petitioners appealed to the United States Court of Appeals for the Fifth Circuit (R. 74), their cases being consolidated on appeal. (R. 76) The action of the District Court was affirmed by the Court of Appeals (R. 115-133), and petitioners' timely application for rehearing (R. 134-143) was overruled. (R. 144)

The Terminal Railway was and is fully owned and operated by the State of Alabama and consists of about 50 miles of railroad track in the area adjacent to the Alabama State Docks at Mobile, Alabama. (R. 68-70) It serves, in addition to the State Docks, several industries located in the area, and it operates an interchange railroad yard where cars are exchanged between the Alabama, Tennessee and Northern Railroad Company, Louisville & Nashville Railroad Company, Southern Railway Company, and Gulf, Mobile & Ohio Railroad Company. (R. 49) The principal source of revenue of the Terminal Railway is for switching services rendered to other railroads, a charge being made for these services. (R. 52) About three to four hundred cars a day are handled by Terminal Railway in that portion of its operation. (R. 53) It also delivers freight to and from shipping which comes into or departs from the Alabama State Docks on vessels arriving from or departing to foreign countries. It owns its own equipment, including 50 miles of track, and employs 130 people. (R. 54-55) It has contracts and working agreements with the various railroad brotherhoods (R. 59-61), one of which provides regulations regarding the conduct of employees in divulging information concerning cases arising under the Federal Employers Liability Act. (R. 71) It reports to the Interstate Commerce Commission concerning injuries sustained by its employees (R. 61-62), and keeps its accounts so as to comply with Interstate Commerce Commission regulations. (R. 65)

These actions<sup>1</sup> were brought under the theory that Terminal Railway is a common carrier by railroad engaging in commerce between the several states, and the provisions of Title 45, U.S.C.A., Section 51, state that "Every common carrier by railroad while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce \* \* \* for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery \* \* \* or other equipment." (Emphasis supplied) Petitioners contend that the all inclusive word "every" as used in the statute, includes railroads operated by states of the United States. "Concurrent jurisdiction of actions under the statute is conferred upon state and federal Courts by 45 U.S.C.A., §56.

## H.

### ARGUMENT.

A Writ of Certiorari should be allowed in this case for the reasons that (1) the Court of Appeals has decided an important question of federal law which has not been

---

1. R. B. Parden filed two of the suits, one for personal injuries sustained July 13, 1958, and another for personal injuries sustained June 3, 1958; Otto Driskell sued for injuries sustained on July 22, 1958; Mrs. Elizabeth W. Wiggins and Frank O. Burge, Jr., as Administrators of the Estate of John Ervin Wiggins, deceased, sued for injuries sustained by Mr. Wiggins on November 15, 1958; and Aubrey E. Price sought damages for injuries he sustained on October 2, 1959. All of the suits were based upon 45 U.S.C.A., §51 et seq., and two of them incorporated separate counts based upon violations of the Federal Safety Appliance Acts, 45 U.S.C.A., §1 et seq.



but should be settled by this Court, and (2) the decision conflicts with the principles of applicable decisions of this Court. Closely related questions have been decided by this Court previously in that it has been held that state owned and operated common carrier railroads are subject to the Safety Appliance Acts (*United States v. California*, 297 U.S. 175, 80 L. Ed. 567, 56 S. Ct. 421), and the Railway Labor Act (*California v. Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037). It having already been determined that two of the three Federal Statutes regulating the employment relationships of all common carrier railroads, it is important to determine whether state operated railroads are also subject to the third such statute, also applying to all interstate common carrier railroads, the Federal Employers Liability Act.

The importance of this federal question is apparent when it is realized that the effect of the decision of the Court of Appeals is to deprive petitioners and others similarly situated of their remedy for enforcement of a clear federally granted right.

This case presents the unique situation of a railroad which is subject to the Federal Safety Appliance Acts (which refer to "any common carrier engaged in interstate commerce by railroad") and the Railway Labor Act (which refers to "any carrier by railroad, subject to the Interstate Commerce Act"), yet it is effectively escaping the consequences of the Federal Employers Liability Act which provides that "every common carrier by railroad" is subject to suit under the act in the District Courts of the United States.

Congress, in the valid exercise of its powers under the Commerce Clause of the United States Constitution, has so regulated railroads, including state operated railroads,

as to require their submission to the strict safety regulations designed to protect employees from injury because of defective railway appliances. Congress has also required state operated railroads to conduct its employee relationships in accordance with the Railway Labor Act. The broad language of the Federal Employers Liability Act equally demands the conclusion that state operated railroads are liable to its injured employees under the act, and the remedy of suit in the U. S. District Courts is a necessary and integral part of the Federal Employers Liability Act.

In our Statement of the Case, we have pointed out sufficient portions of the record to show that the Terminal Railway is engaged in extensive profitable operations as a common carrier by railroad for hire in interstate commerce, and as was recognized in the opinion of the Court of Appeals, there is no dispute on this point. The operation of this railroad is authorized by amendments to the Constitution of the State of Alabama as well as by enabling statutes. Thus, the State of Alabama has constitutionally placed this agency in the category of railroads included in the broad definition of carriers subject to the Federal Employers Liability Act. By engaging in such a business, the railroad is necessarily subject to certain obligations, duties and liabilities imposed by the Federal Statutes. Congress having spelled out its regulations of railroads so as to include any and every railroad, when a state chooses to go into the railroad business, it must accept the obligations and liabilities imposed upon railroads by Congress. One of these is that such railroad is amenable to suit in a United States District Court under the PELA, and when Alabama placed itself under the Act, it necessarily subordinated any immunities which it otherwise might have had to the valid regulations of Congress with respect to such railroad business.

When this Court held that the State Belt Railroad of California was subject to the Federal Safety Appliance Act (the action originated as a suit to recover the statutory penalty for a violation), it held that the exercise by a state of the power to operate a railroad must be in subordination to the power of Congress to regulate interstate commerce. Further:

"The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the constitution.

\* \* \*

"California, by engaging in interstate commerce by rail, has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. **The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances. \* \* \*. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.**

\* \* \*

"Since the section which, as we have held, imposes the liability upon state and privately-owned carriers alike, also provides the remedy and designates the manner and the court in which the remedy is to be pursued, we think the jurisdictional provisions are as applicable to suits brought to enforce the liability

of states as to those against privately-owned carriers, and that the district court had jurisdiction."

*United States v. California*, 297 U.S. 175, 80 L. Ed. 567, 56 S. Ct. 421.

Later, when California's railroad was again before this Court seeking to avoid the consequences of the Railway Labor Act, it contended that congressional intent to include state railroads within the act was doubtful because other federal statutes governing employer-employee relationships expressly exempted employees of the United States or of a state. In holding that the Railway Labor Act applied to state railroads, this Court said:

"We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees.

\* \* \*

"If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships."

*California v. Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037.

The FELA is the third Act of the Congress which regulates railroads in regard to their duties as to employees. Although this Court has already held that state railroads are governed by two of such regulations, it has yet to pass on the applicability of the FELA. (However, it has held that the parallel Jones Act does apply to state agencies which employ seamen, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785; and California holds that its railroad is subject to

FELA suits in its state courts. *Maurice v. State*, 34 Cal. App. 2d 270, 110 P.2d 706.)

### CONCLUSION.

The position of petitioners may be summarized in outline form as follows:

1. In delegating to the federal government the exclusive power to regulate interstate commerce, the states vested in Congress the right to regulate all interstate railroads, whether state or privately operated.

2. In so doing, the states necessarily surrendered any sovereign immunity which may conflict with valid regulations of Congress which are applicable to state operated railroads.

3. Congress having made the FELA applicable to "every common carrier by railroad", which necessarily includes state operated railroads, states thereafter choosing to engage in an interstate railroad business must be considered as having entered into such enterprise in full subordination to the all-embracing terms of the FELA, a portion of which subjects such railroads to suits in District Courts of the United States.

Petitioners suggest that since this Court has already held that the Safety Appliance Acts, the Railway Labor Act and the Jones Act all apply to state agencies which come within the all-embracing terms of those acts, and a United States Court of Appeals has held that the equally all-embracing terms of the FELA do not apply to states, a federal question has been decided in a way which conflicts with applicable decisions of this Court, and therefore certiorari should be granted. It further appears that this is an important question of federal law which has not



been directly decided by this Court, but should be now settled. As was observed by Circuit Judge Brown in his concurring opinion in the Court below, petitioners have a clear legal right. But the decision of the Court of Appeals has denied them the means of effectual enforcement. The decision conflicts with the principles upon which the decisions of this Court were based in the California cases. This conflict can only be rectified by the granting of a Writ of Certiorari so that the question may be fully reviewed by this Court.

Respectfully submitted,

---

AL. G. RIVES,  
*Attorney for Petitioners.*

TIMOTHY M. CONWAY, JR., and  
RIVES, PETERSON, PETTUS & CONWAY,  
*Of Counsel for Petitioners.*

#### **CERTIFICATE AS TO SERVICE.**

I hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari, properly addressed, to each of the following: Honorable Richmond Flowers, Attorney General for the State of Alabama, Montgomery, Alabama; and Honorable Willis C. Darby, Jr., Attorney at Law, First National Bank Building, Mobile, Alabama, counsel of record for defendants in the Court below, by depositing the same in a United States Post Office or mail box, with first-class postage prepaid.

This the \_\_\_\_\_ day of May, 1963.

---

AL. G. RIVES,  
*Attorney for Petitioners.*

## **APPENDIX**

**APPENDIX A.**

**Opinion of Court Below.**

**IN THE  
United States Court of Appeals  
FOR THE FIFTH CIRCUIT**

---

**No. 19519**

---

**R. B. PARDEN, ET AL.,  
Appellants,  
versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL.,  
Appellees.**

---

**Appeal from the United States District Court for the  
Southern District of Alabama.**

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**(January 3, 1963)**

---

**Before RIVES, CAMERON and BROWN, Circuit Judges.**

**CAMERON, Circuit Judge:** This appeal involves the question whether the State of Alabama may be sued by its citizen in a District Court of the United States on a claim

based upon the Federal Employers Liability Act<sup>1</sup> for damages for personal injuries sustained by its citizen while employed by a railroad belonging to the State of Alabama which was operated as a common carrier in interstate commerce and while he was so engaged. The action<sup>2</sup> was brought against Terminal Railway Alabama State Docks; and the sovereign State of Alabama, entering its appearance specially, moved to quash the return of summons on it or to dismiss the action, on the grounds that the Terminal Railway was an agency of the State, that the State had not

1. Title 45, U.S.C.A., § 51:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or any insufficiency, due to its negligence, in its cars, engines, appliances, machinery . . . or other equipment."

Concurrent jurisdiction of actions under the statute is conferred by 45 U.S.C.A., § 56, in state and federal courts.

2. Besides the action brought by R. B. Parden for personal injuries sustained July 13, 1958, four other actions were brought which involve the same jurisdictional facts as Parden's claim, varying only in the details of the facts as to liability and the injuries received. These four are: a second action filed by Parden for personal injuries sustained June 3, 1958; action by Otto Driskell alleging two injuries received by him on July 22, 1958; action by Mrs. Elizabeth W. Wiggins and Frank E. Burge, Jr., Administrators of the estate of John Irvine Wiggins, deceased, based on claims for two injuries received by him November 15, 1958, contributing to his death; and action by Aubrey E. Price claiming two separate personal injuries occurring Oct. 2, 1959, one based upon the Federal Employers Liability Act and the second upon the Federal Safety Appliance Act, 45 U.S.C.A., § 2. The several actions were consolidated for trial in the court below and for purposes of this appeal.

The first action of R. B. Parden will be discussed in most instances, but everything herein said will have reference also to the other four civil actions.

consented to be sued or waived its immunity, and that the judicial power of the United States did not extend to this controversy because it is between a citizen of Alabama and the State of Alabama. Both motions were heard on the face of the pleadings supplemented by four affidavits and two depositions and were granted by the court below in an order stating:

"It is Ordered by the Court that the motion of the Sovereign State of Alabama to quash return of service of summons be, and the same hereby is, Granted, and

"It is Further Ordered by the Court that the motion of the Sovereign State of Alabama to dismiss the action be, and the same hereby is, Granted, with costs herein taxed against the Plaintiff."

The parties do not contend on appeal that there is any dispute about the facts, but agree that the case presents only questions of law. The basic facts are here set forth and others will be adverted to in our discussion of the several arguments:

The Terminal Railway was and is wholly owned and operated by the State of Alabama, consists of about fifty miles of railroad tracks in the area adjacent to the Alabama State Docks at Mobile, Alabama, serving in addition several industries situated in the general vicinity, and operating an interchange railroad with Alabama, Tennessee and Northern Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, and Gulf, Mobile and Ohio Railroad Company. A large percent of its operations are in interstate commerce; and it has contracts and working agreements with the various railroad brotherhoods, and makes reports to the Interstate Commerce Commission concerning injuries sustained by its



employees, and keeps its accounts so as to comply with the regulations of the Interstate Commerce Commission.

Appellant Parden argues that the owner of every common carrier by railroad engaging in interstate commerce is liable for injuries to its employees so engaged under the clear and all-embracing language of the F.E.L.A. quoted in footnote 1, *supra*,<sup>3</sup> that the State of Alabama is so liable because it operates this railroad under constitutional amendment<sup>4</sup> and statute;<sup>5</sup> and that, under the Commerce Clause of The United States Constitution and three Supreme Court cases hereinafter considered, it is subject to and liable under F.E.L.A. and the Safety Appliance Act to the same extent as an individual.

Alabama counters with the contention that the whole sum of the judicial power granted by the Constitution to the central government does not embrace any authority in its courts to entertain a suit brought by a citizen against his own State; and that the State of Alabama has not waived its immunity from suit. The appellant responds by asserting that the general principles relied upon by the State do not apply where the State is deemed to have consented to suit; and that, since Alabama is not protected by the Eleventh Amendment to the Constitution, it is deemed to have consented by the mere fact that it entered into and conducted the operation of an interstate railroad under the statutory and organic law of the State.<sup>6</sup>

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3. And under the Federal Safety Appliance Act, Title 45, U.S.C.A., § 2, as to one of the civil actions now before us.

4. Alabama Constitution, 1901, Amendments 12 and 116.

5. 1940 Code of Alabama (Recompiled, 1958), Title 38, §§ 17 and 45 (14, 16).

6. Appellant's position is well epitomized in the following excerpts from its reply brief:

"None of the authorities cited under this subdivision of the opposing argument hold that the judicial power of the

We do not agree that the State of Alabama, by the mere fact that it legally operated an interstate carrier, surrendered its right not to be sued, which belongs to the Union and all the States in it, except as explicitly provided otherwise in the Constitution. It is conceded that Alabama could not be sued by a citizen of another State seeking to assert the identical right claimed here. This, the appellant conceives to be a protection vouchsafed by the Eleventh Amendment which, it says, Alabama does not possess when it is sued by its own citizen. We think this attitude arises from a misunderstanding of the effect of the Eleventh Amendment and of the status of the States of the Union independent of it. This is made clear by a brief consideration of the history of the Amendment as developed in decisions of the Supreme Court.

Almost before the ink had dried on the signatures to the Constitution, a citizen of South Carolina filed suit against the State of Georgia in the Supreme Court of the United States asserting jurisdiction under Article III, Section 2, Clause 1 of the Constitution.<sup>7</sup> The Supreme Court<sup>8</sup>

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United States does not embrace the authority to entertain a suit brought by a citizen against his own state, where the State has consented to such suit. . . .

"We urge that it is a sound construction of the Federal Employers Liability Act, when considered in the light of Supreme Court decisions concerning the Safety Appliance Acts and the Railway Labor Act, that Congress has prohibited any entity, state or private, from engaging in business as an interstate common carrier railroad, without consenting to be sued in a United States District Court under the Federal Employers Liability Act. . . .

"As we see it, if the Constitution of the State of Alabama authorizes the operation of this railroad, then it is subject to all the provisions of the Federal Employers Liability Act. Liability under the Act can be avoided only if the State is acting unconstitutionally by operating the Terminal Railway of Alabama State Docks."

7. "The judicial Power shall extend . . . to controversies . . . between a State and Citizens of another State; . . . and between a State . . . and foreign States, Citizens or Subjects." [Emphasis added.]

8. *Chisolm, Executor v. Georgia*, 1793, 2 U.S. 419.

upheld the claimed right in a decision whose essence the syllabus sums up in these words: "A State may be sued, in the Supreme Court, by an individual citizen of another State . . ."

The people, who had just adopted a Constitution which delegated certain powers to the central government, did not agree with this construction of what they had written; and they promptly adopted the Eleventh Amendment: "The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." [Emphasis supplied.]

The Amendment dealt solely with the prepositional phrases—"between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects"—being cast in the precise words of those phrases. And it dealt with the *construction* of those phrases only, stating without equivocation that the grant of power was not to be construed as authorizing a citizen or subject to sue another State. It directed simply that no court considering that phrase should have the power to construe it other than as directed by the Eleventh Amendment. The Amendment did not add anything to the Constitution and did not take anything from it. It simply gave directions as to the meaning of a phrase already in the Constitution. It was definitely a limitation on the right of any court to construe that language of the Constitution in such a way as to diminish the immunity from suit which is an essential and universal attribute of sovereignty.

It was not necessary that the Amendment negate the right of a citizen to sue his own State because Article III of the Constitution, which alone deals with the federal

Judiciary and defines the judicial power being delegated to the central government, nowhere mentions or hints at a case or controversy between a State and its own citizens as being justiciable by any court. As against its own citizens, therefore, a State did not need and has never needed the shelter or protection of the Eleventh Amendment.

It was almost a century after *Chiselm v. Georgia* and the Eleventh Amendment before the Supreme Court was faced with a suit brought by a citizen against his own State, *Hans v. Louisiana*, 1890, 134 U.S. 1. Jurisdiction in the Circuit Court was claimed under Article III of the Constitution, which declares that "The Judicial Power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made . . .," and the Act of March 3, 1875, 18 Stat. 470, c. 137, §1, now 28 U.S.C.A. §1331 (a), vesting in the Circuit Courts jurisdiction "of all suits of a civil nature at common law or in equity, arising under the Constitution or laws of the United States, or treaties made . . ." The lower court dismissed the suit and the Supreme Court affirmed without a dissent.

The opinion analyzes thoroughly the decision in *Chiselm v. Georgia*, the Eleventh Amendment, and the debates among the writers of the Constitution, and, in addition, those between Mason and Patrick Henry on one side and Madison and Marshall on the other, in the Virginia Convention. It quotes from Madison: "Its jurisdiction [the Federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court;" and from Marshall: "With respect to disputes be-

tween a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the Federal Court . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . ." And it characterizes the contention that the passage of the Eleventh Amendment had the effect of leaving a State open to suit by its own citizens in cases arising under the Constitution or laws of the United States as ". . . supposition . . . almost an absurdity on its face." [Pp. 14 and 15.]

After quoting from a statement by Chief Justice Taney in *Beers et al v. Arkansas*, 20 Howard 527, 529: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued . . .," the opinion states its conclusion thus:

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence . . ."

This decision, in *Hans v. Louisiana* has been cited as authority by the Supreme Court in approximately thirty cases.<sup>9</sup>

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9. E.g., *Ford Motor Co. v. Dept. of Treas. of Indiana*, 323 U.S. 459, 464; *Great Northern Ins. Co. v. Read, Ins. Comm.*, 1944,



This line of cases constitutes a continuing affirmation by the Court of the basic principle that the federal judicial system is one of enumerated powers, not of enumerated limitations upon power. The lack of power in the court below, therefore, to entertain a suit by the individual against the State is not dependent upon the negative language of the Eleventh Amendment, which merely points out that such power is not given, but on the basic fact that such power is not lodged in the federal judiciary under our constitutional system.

It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other State, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State.

The *Ford Motor Company* case, *supra*, stands for the well settled rule that waiver by a State of its sovereign immunity must be clearly shown, and that whether such a waiver has been established presents a question to be decided under State law (pp. 466-470). And cf. *Louisiana Land and Exploration Co. v. State Mineral Board*, 5 Cir., 1956, 229 F.2d 5, certiorari denied, 351 U.S. 975.

The Supreme Court of Alabama considered the provisions of the Alabama Constitution and statutes involved in the case before us in *State Docks Commission v. Barnes*, 1932, 143 So. 581. It was there decided that a claim for the death of one of the employees of the State Docks Commis-

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322 U.S. 47, 51; *Monaco v. Mississippi*, 1934, 292 U.S. 313, 322; *Williams v. United States*, 1933, 289 U.S. 553, 575; *Ex parte State of New York*, 1921, 256 U.S. 490, 497; *Duhne v. New Jersey*, 1920, 251 U.S. 311, 313; *Palmer v. Ohio*, 1918, 248 U.S. 32, 34; *Ex parte Young*, 1908, 209 U.S. 123, 150.

sion was a claim against the State, which was "performing a business or corporate power and not a governmental function." Continuing, the court said (page 582):

"But Section 14 of the Bill of Rights of the Alabama Constitution provides that the State shall never be made a defendant in any court of law or equity. The State cannot consent to such a suit. This means not only that the State itself may not be sued, but that this cannot be indirectly accomplished by suing its officers or agents in their official capacity, when a result favorable to plaintiff would be directly to affect the financial status of the State treasury ..."

"The right to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers v. Arkansas*, 20 Howard 527; *Railroad Company v. Tennessee*, 101 U.S. 337; *Hans v. Louisiana*, 134 U.S. 1." So says the Supreme Court in *Palmer et al v. State of Ohio*, 1918, 248 U.S. 32. And it is not contended that Alabama has given its express consent, but, on the contrary, its Supreme Court has held that it cannot so consent.

It is pertinent to mention that the State of Alabama has provided payment for injury to or death of any employee of the agency here involved "where in law, justice or good morals the same should be paid;" and that the remedy so provided is characterized by the Supreme Court as "a workmen's compensation law for State employees," *State Board of Adjustment v. Lacks*, 1945, 22 So.2d 377; and cf. *Hawkins v. State Board of Adjustment*, S. Ct. Ala., 1942, 7 So.2d 775.

It remains but to consider the three Supreme Court cases upon which appellant bases his chief reliance. The appellant frankly points out that none of the cases are

applicable on their facts, but contends that some of the language found in the opinions warrants the assumption that, by operation of law, Alabama necessarily waived its immunity from suit by electing to operate a common carrier engaged in interstate commerce. The language of each of the cases is, of course, limited to the facts with which the Court was dealing.

In *United States v. California*, 1936, 297 U.S. 175, it was claimed that § 6 of the Safety Appliance Act vested jurisdiction in the district court to entertain the suit by the United States for a statutory penalty imposed for violation of the Act. The application of the decision of the Supreme Court in that case, insofar as it has possible relation to the question before us, is thus pinpointed at page 187:

"Article III, § 2 of the Constitution extends the judicial power of the United States and the original jurisdiction of the Supreme Court to cases 'in which a State shall be a party.' . . . But Congress may confer on inferior courts concurrent original jurisdiction of such suits. . . . Section 233 of the Judicial Code, 28 U.S.C., 341 . . . gives to this Court 'exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens or between a State and citizens of other States or aliens.' "

The Court then goes on to decide that the later enacted § 6 of the Safety Appliance Act provides that the penalty which it imposes supersedes, for practical reasons, the provisions of the Judicial Code and, therefore, vests in the district court jurisdiction to recover the penalty against the State. The power to maintain the suit against the State is specifically vested by the Constitution in the United States. The case does not hint that an individual in whom the Constitution does not vest such a power could maintain such a suit against a State.

The action in *California v. Taylor, et al*, 1957, 353 U.S. 553, was brought by five employees of the State Belt Railroad operated by the Board of State Harbor Commissioners of California against the ten members of the National Railroad Adjustment Board, First Division, and its Executive Secretary. The United States, answering on behalf of the Board, supported the charges in the complaint that the Belt Road was governed by the Railway Labor Act of 1926 rather than by the Civil Service Laws of the State of California. The State of California intervened as a party defendant and opposed the claim of the employees of the Belt Railroad in which they sought to invoke the machinery of the Railway Labor Act. The Supreme Court held that the operation of the Belt Railroad was covered by the Railway Labor Act, and referred to the fact that several State courts, including an intermediate appellate court of California,<sup>10</sup> had held state owned belt railroads such as the ones here involved subject to the Federal Employers Liability Act. Following its decision in *United States v. California*, supra, the Supreme Court held that Congress had the right to regulate the California Belt Railroad's employment relationships. In Note 16, page 568, however, the Supreme Court stated:

"The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Labor Relations Board in a suit against the State in a United States District Court under § 3, First (p) of the Act is not before us under the facts of this case."

This statement by the Supreme Court disposes of the contention of the appellants that this case is authority for the contention that Alabama had waived its immunity from suit.

10. *Maurice v. State*, Dist. Ct. App., Cal., 1941, 110 P.2d 706.

*Petty v. Tennessee-Missouri Bridge Commission*, 1959, 359 U.S. 275, involved the question whether Tennessee and Missouri had waived their immunity to be sued when those States entered into a compact, with Congressional approval, for the construction of a bridge over the Mississippi River. To build and manage the bridge, there was created the Tennessee-Missouri Bridge Commission; a "body corporate and politic," wherein it was provided that the Commission had the power "to contract, to sue and be sued in its own name." The Court, after noting that "The conclusion that there has been a waiver of immunity will not be lightly inferred, *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171," decided that, under the facts of that case and "where the waiver is, as here, claimed to arise from a compact between several States," the Commission was suable under the sue-and-be-sued clause interpreted in the light of the conditions attached by Congress in approving the bridge over the navigable stream.<sup>11</sup> We think that the case is not authority for the waiver claimed here, and refer to the language used by this Court in *McDermott & Co. v. Department of Highways, State of Louisiana*.<sup>12</sup>

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11. In a footnote, Mr. Justice Frankfurter, dissenting (page 289), stated the following:

"Suit in *United States v. California*, 297 U.S. 175, was instituted by the United States, and jurisdiction over such an action is not within the proscription of the Eleventh Amendment. In *California v. Taylor*, 353 U.S. 553, the State intervened in an action brought against the National Railroad Adjustment Board, hence voluntarily submitted itself to the jurisdiction of the federal courts."

12. 5 Cir., 1959, 267 F.2d 317, 318:

"Appellee, in its turn, citing, as settling the law to the contrary of this contention, other cases and *Petty v. Tenn.-Mo. Bridge Comm.*, 8 Cir., 254 F.2d 857, reversed (three judges dissenting) in *Petty v. Tenn.-Mo. Bridge Comm.*, 358 U.S. 811 . . . not in principle but on the sole ground that the Act of Congress approving the interstate compact had made provision for the suit there brought; urges upon us that the judgment must be affirmed.



Based upon the authorities cited and the foregoing reasons, we hold that the State of Alabama is constitutionally immune from suit under the facts before us and that there has been no waiver of this immunity. The judgments entered in the captioned case and the others consolidated with it by order of the court below are

**AFFIRMED.**

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BROWN, Circuit Judge, concurring specially:  
I concur in the result and in much of the Court's opinion.

But in at least two places the Court states that "the State of Alabama is constitutionally immune from suit."

— F.2d —<sup>1</sup> Apart from the Eleventh Amendment, I find nothing in the Constitution nor in the elaborate structure of the opinion in *Hans v. Louisiana*, 1890, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842, to support that conclusion as a matter of federal constitutional law. Sovereign immunity threadbare as it generally is, is recognized in law. It may, as it does here, deny effectual enforcement to a clear legal right. But that does not raise this motion to the stature of a federal constitutional right.

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"This Court in a case involving a collision with a bridge in Broward County, Florida [*Broward County, Florida, v. Wickman*, 5 Cir., 195 F.2d 614], has settled it for this Circuit, as the Supreme Court in *Ex parte, State of New York*, 356 U.S. 490, . . . has for the country as a whole, that 'the immunity of a State from a suit in personam in the admiralty brought by a private person without its consent is clear.'"

1. See also: "It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State." — F.2d

Moreover, I think the constitutional crisis generated by *Chisholm v. Georgia*, 1792, 2 U.S. 2 Dall 419, 1 L. Ed. 440, refutes this Court's thesis that when it was all said and done the Eleventh Amendment "• • • did not add anything to the Constitution and did not take anything from it." —

F.2d \_\_\_\_\_. And to the extent that *Hans v. Louisiana* really puts the result on the basis of the traditional immunity of a State, rather than on the obvious implications of the Eleventh Amendment, it seems clear to me that the Supreme Court did not undertake to cast it,<sup>2</sup> as does this Court, in terms of a Constitution of enumerated powers and the "basic fact that such power is not lodged in the federal judiciary under our constitutional system." —

F.2d \_\_\_\_\_. This latter would, among other things, mean that jurisdiction would be conferred by consent (of the sovereign waiving its immunity). This certainly contradicts a basic concept of a limited federal jurisdiction.

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2. The strongest statement in *Hans* in this direction is: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. 1, 15.

The Court speaks again in terms of suits unknown to or forbidden by law in *Fitts v. McGhee*, 1899, 172 U.S. 516, 524, 19 S. Ct. 269, 43 L. Ed. 535:

"Is this a suit against the State of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a state by citizens of such state. But it has been adjudged by this court upon full consideration that a suit against a state by one of its own citizens, the state not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a state by citizens of another state of the Union, or by citizens or subjects of foreign states. *Hans v. Louisiana*, 134 U.S. 1, 10, 15 [33:842, 845, 847]; *North Carolina v. Temple*, 134 U.S. 22 [33:849]. It is therefore an immaterial circumstance in the present case that the plaintiffs do not appear to be citizens of another state than Alabama, and may be citizens of that state."

What the case presents is the anomaly of a clear legal right without any means of effectual enforcement. Without a doubt, Alabama and its operating agencies, the Terminal Railway and Docks Department are subject to the FELA. It is even likely that its scheme of vicarious workmen's compensation constitutes an outright violation of the Act which prohibits any contract, rule, regulation or device to enable a common carrier to exempt itself from the liabilities imposed.<sup>3</sup>

But clear as is the legal right, invalid as is the substitute compensation program, neither in the FELA nor in the Alabama statutes prescribing the physical operation of this interstate carrier is there enough material out of which to extract even the faintest notion of a waiver of that traditional immunity which Alabama painstakingly has additionally preserved by its own express constitutional provision.

The suit therefore must fail. But we should not by our discussion couched in language of a constitutional immunity apart from the Eleventh Amendment foreclose remedial action by Congress or, perhaps, judicial relief in its own courts at the hands of agencies of the United States Government whose statutory policy may not be thwarted by this plea.

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3. "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void \* \* \*." 45 U.S.C.A., § 55.

**APPENDIX B.**

**United States Court of Appeals**

**FOR THE FIFTH CIRCUIT**

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**October Term, 1962**

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**No. 19,519**

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**D. C. Docket Nos. 2551, 2552, 2553, 2588, 2697 Civil.**

**R. B. PARDEN, ET AL.,**

**Appellants,**

**versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE**

**DOCKS DEPARTMENT, ET AL.,**

**Appellees.**

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**Appeals from the United States District Court for the  
Southern District of Alabama.**

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**Before RIVES, CAMERON and BROWN, Circuit Judges.  
JUDGMENT**

**This cause came on to be heard on the transcript of the  
record from the United States District Court for the South-  
ern District of Alabama, and was argued by counsel;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments entered in the captioned case and the others consolidated with it by order of the court below be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellants, R. B. Parden, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, Concurs Specially"

January 3, 1963

Issued as Mandate: March 20, 1963



**APPENDIX C.**

**Order of Court Denying Petition for Rehearing**

[102]

**IN THE**

**United States Court of Appeals**

**FOR THE FIFTH CIRCUIT**

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**No. 19,519**

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**R. B. PARDEN, ET AL.,**

**Appellants,**

**versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE**

**DOCKS DEPARTMENT, ET AL.,**

**Appellees.**

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**Appeals from the United States District Court for the  
Southern District of Alabama.**

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**(February 27, 1963)**

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**ON PETITION FOR REHEARING**

**Before RIVES, CAMERON and BROWN, Circuit Judges.  
PER CURIAM.**

**IT IS ORDERED that appellants' petition for rehear-  
ing be, and it is hereby DENIED.**

## APPENDIX D.

## 45 U.S.C.A., § 51

**§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia, and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children or such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

**APPENDIX E.****45 U.S.C.A., § 56****§ 56. Actions; limitations; concurrent jurisdiction of courts**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

**APPENDIX F.****45 U.S.C.A., § 1****§ 1. Driving-wheel brakes and appliances for operating train-brake system**

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed

without requiring brakemen to use the common hand brake for that purpose. Mar. 2, 1893, c. 196, § 1, 27 Stat. 531.

## APPENDIX G.

### 45 U.S.C.A., § 2

#### § 2. Automatic couplers

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, § 2, 27 Stat. 531.

## APPENDIX H.

### ALABAMA CONSTITUTION OF 1901, AMENDMENT 12

#### XII.

##### MOBILE PORT AMENDMENT.

Section 93. The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such, except as may be authorized by the Constitution of Alabama or amendments thereto; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation, except as may be expressly authorized by the Constitution of Alabama, or amendments thereto; but when authorized by laws passed by the legislature the state may appropriate funds to be applied to the construction, repair, and maintenance of public roads, highways and bridges in

the state; and when authorized by appropriate laws passed by the legislature the state may at a cost of not exceeding ten million dollars engage in the work of internal improvement, or promoting, developing, constructing, maintaining, and operating all harbors and seaports within the state or its jurisdiction, provided, that such work or improvement shall always be and remain under the management and control of the state, through its state harbor commission, or other governing agency. The adoption of this amendment shall not affect in any manner any other amendment to the Constitution of Alabama which may be adopted pursuant to any act or resolution of this session of the legislature.

## APPENDIX I.

### ALABAMA CONSTITUTION OF 1901,

#### AMENDMENT 116

#### CXVI.

#### STATE WORKS OF INTERNAL IMPROVEMENT ALONG NAVIGABLE WATERWAYS AND INDEBTEDNESS THEREFOR.

In addition to the authority heretofore granted it by section 93 of this Constitution as amended, and notwithstanding the provisions of section 213 of this Constitution as amended, and when authorized by appropriate laws passed by the legislature, the state may, at a cost of not exceeding an additional ten million dollars engage in works of internal improvement by promoting, developing, constructing, maintaining and operating along navigable streams or waterways now or hereafter existing within the state all manner of docks, facilities, elevators, warehouses, water and rail terminals and other structures and facilities and improvements needful for the convenient use of the same, in aid of commerce and use of the water-



ways of the state; provided that any such work or improvements shall always be and remain under the management and control of the state through the Alabama state docks department or other state governing agency. When authorized by appropriate laws passed by the legislature, the state may become indebted in an aggregate principal amount of not exceeding \$10,000,000 for the purpose of carrying out the provisions of this amendment and may cause to be issued its general direct obligation bonds for the repayment of such indebtedness and interest thereon and pledge the faith and credit of the state thereto.

## APPENDIX J.

### 1940 CODE OF ALABAMA (RECOMPILED 1958)

#### TITLE 38, § 17

**§ 17. State may acquire, etc., terminal railroads.—**  
The state through the department shall have the power and authority to acquire, own, lease, locate, install, construct, hold, maintain, control and operate at seaports a line of terminal railroads with necessary sidings, turn outs, spurs, branches, switches, yard tracks, bridges, trestles, and causeways and in connection therewith or appurtenant thereto shall have the further right to lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyances or appliance necessary or proper to carry passengers, goods, wares, and merchandise over, along or upon the tracks of such railroads or other conveyances. And the state, acting through the said department, shall have the right and authority to make agreements as to scale of wages, seniority and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the opera-

tion of the terminal railroads provided for in this section, and the service and equipment pertinent thereto. And should the said department exercise the authority herein given then in such event it shall be the duty of the said department to make such agreements with said employees hereinabove specified, in accordance with the act of congress known as the Railway Labor Act (U.S.C. Title 45, sections 151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby. The state, acting through the said department, shall have the right and authority with its terminal railroads to connect with or cross any other railroad upon the payment of just compensation and to receive, deliver to and transport the freight, passengers, and cars of common carrier railroads as though it were an ordinary common carrier. (1923, p. 330; 1927, p. 1; 1935, p. 821; 1936, Ex. Sess. p. 57.)

## APPENDIX K.

### 1940 CODE OF ALABAMA. (RECOMPILED 1958)

#### TITLE 38, § 45 (14, 16)

§ 45(14): **Authority of state and state docks department.**—In addition to the authority granted to the state of Alabama by the provisions of section 93 of the Constitution of Alabama as amended, and any other laws of this state, the state is hereby expressly authorized and empowered to engage in works of internal improvement by promoting, developing, constructing, maintaining and operating along navigable rivers, streams or waterways

now or hereafter existing within this state; all manner of dock facilities, elevators, compresses, warehouses, water and rail terminals, and other structures and facilities and improvements of every kind needful for the convenient use of same, in aid of commerce and use of the waterways of this state, provided, however, that all such works, improvements and facilities shall always be and remain under the management and control of the Alabama state docks department. The Alabama state docks department shall be the agency of the state under which the state shall accomplish all the purposes of this chapter and the acquisition, construction, maintenance and operation of all the improvements and facilities acquired or constructed or enlarged pursuant to the provisions of this chapter. (1957, p. 409, § 1.)

**§ 45(16). Authority to acquire, construct, maintain, etc., facilities.**—Through the Alabama state docks department, the state, in engaging in the works of internal improvements authorized by this chapter, shall have the power to acquire, purchase, install, lease, construct, own, hold, maintain, equip, control and operate along navigable rivers, streams or waterways and at river ports or landings along navigable rivers, streams or waterways now or hereafter existing within the state, wharves, piers, docks, quays, grain elevators, cotton compresses, warehouses, improvements and water and rail terminals and such structures and facilities as may be needful for convenient use of the same, in aid of commerce and use of navigable waterways of the state, to the fullest extent practical and as the state docks department shall deem desirable or proper. This authority shall include dredging of approaches to any facilities acquired, erected, maintained or operated pursuant to this chapter; provided, however, that before the state docks department shall exercise the authority invested in it hereby, the director of state docks

shall first submit plans, including estimates of cost, prepared by competent engineers or architects, and a survey made by competent independent and professional engineers showing the economic feasibility of exercising its authority, to the governor for his approval or disapproval in reference thereto, and, as to dredging, the state docks director shall likewise confer with proper United States authorities; provided, the state docks department shall have no authority to condemn or acquire by exercise of the right of eminent domain any privately owned ports, terminal, docks or loading facilities located on any navigable river or stream except at the port of Mobile. (1957, p. 409, § 3.)

#### APPENDIX L.

UNITED STATES CONSTITUTION, ART. I, § 8, cl. 3

(Commerce Power)

"The Congress shall have the Power \* \* \* To regulate Commerce with foreign Nations and among the several States \* \* \*"

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**SUPREME COURT, U. S.**

**Supreme Court of the United States**

**OCTOBER TERM, 1963.**

Office-Supreme Court, U.S.  
**FILED**

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**No. 157**

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**R. B. PARDEN, OTTO DRISKELL, MRS. ELIZABETH  
W. WIGGINS AND FRANK O. BURGE, JR., Suing  
in Their Capacity as Administrators of the Estate of  
JOHN ERVIN WIGGINS, Deceased, and AUBREY  
E. PRICE,**

**Petitioners,**

**versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL.,  
Respondents.**

---

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI.**

---

**RICHMOND M. FLOWERS,**  
As Attorney General of the State  
of Alabama,  
**WILLIS C. DARBY, JR.,**  
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Mobile, Alabama.

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SUPREME COURT OF THE UNITED STATES.**

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI.**

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**A.**

**QUESTIONS PRESENTED FOR REVIEW.**

May the State of Alabama be sued without its consent by a citizen of the State of Alabama in a District Court of the United States on a claim based upon the Federal Employers Liability Act for damages for personal injuries sustained by the citizen while employed by a railroad owned and operated by the State of Alabama as a common carrier engaged in interstate commerce?

## B.

**CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.**

The following constitutional provisions and statutes in addition to those specified in the Petition for a Writ of Certiorari are involved:

**CONSTITUTION OF THE UNITED STATES,  
ARTICLE III, SECTION 2, CLAUSE 1.****JURISDICTION OF COURTS.**

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

**CONSTITUTION OF THE UNITED STATES,  
AMENDMENT XI.**

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CONSTITUTION OF ALABAMA, 1901,  
ARTICLE 1, SECTION 14.

That the State of Alabama shall never be made a defendant in any court of law or equity.

C.

ARGUMENT.

The Petition for a Writ of Certiorari should be denied.

The decision of the Court of Appeals followed applicable decisions of this Court. The Court of Appeals applied the fundamental principle precisely stated by this Court in *Duhne v. State of New Jersey*, 1920, 251 U.S. 311, 313, 64 L. ed 280, 281, 40 S. Ct. 154:

. . . it has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. (Citing numerous cases.)

A suit by a citizen against his own state "cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States." *Missouri v. Fiske*, 1933, 290 U.S. 18, 26, 78 L. ed 145, 149, 54 S. Ct. 18.

*United States v. California*, 1936, 297 U.S. 175, 80 L. ed 567, 56 S. Ct. 421 and *California v. Taylor*, 1957, 353 U.S. 553, 1 L. ed 2d 1034, 77 S. Ct. 1037, cited by petitioners, are inapposite. The question of the jurisdiction of a federal court to entertain a suit by a citizen against his own state was not involved in either case; the United States brought the action in *United States v. California*, *supra*; in *California v. Taylor*, *supra*, California waived its immunity by intervening as a party defendant.

No conflict exists between the decision below and *Petty v. Tennessee-Missouri Bridge Commission*, 1959, 359 U.S. 275, 3 L. ed 2d 804, 79 S. Ct. 785, where this Court with three dissents held that an act of Congress approving an interstate compact which specifically provided that the Commission had the power "to sue and be sued in its own name" authorized a suit against the Bridge Commission by a citizen.

The argument that the State of Alabama waived its immunity from suit ignores *Ford Motor Company v. Department of Treasury of the State of Indiana*, 1945, 323 U.S. 459, 89 L. ed 389, 65 S. Ct. 347 and the precise language of Article 1, Section 14 of the Constitution of Alabama 1901:

That the State of Alabama shall never be made a defendant in any court of law or equity.

### CONCLUSION.

The Court of Appeals applied established uniform precedents of this Court in concluding that the State of



Alabama is immune from suit by a citizen of the State of Alabama; no conflict, real or apparent, exists between the decision below and any case decided by this Court.

The Petition for Certiorari should be denied.

Respectfully submitted,

RICHMOND M. FLOWERS,  
As Attorney General of the State  
of Alabama,

WILLIS C. DARBY, JR.,  
Attorney for Respondents.

---

**CERTIFICATE AS TO SERVICE.**

I, Willis C. Darby, Jr., hereby certify that I have mailed a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari, properly addressed to Honorable Al G. Rives and Honorable Timothy M. Conway, Jr., counsel of record for Petitioners, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the .... day of July, 1963.

WILLIS C. DARBY, JR.,  
Attorney for Respondents.

Office-Supreme Court, U.S.  
**FILED**

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**SUPREME COURT, U. S.**

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1962**

**No. 157**

**R. B. PARDEN ET AL.,  
Petitioners,**

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**TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT ET AL.**

**BRIEF OF PETITIONERS**

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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IN THE  
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**BRIEF OF PETITIONERS**

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COURT OF APPEALS FOR THE FIFTH CIRCUIT

A.

**REPORT OF THE OPINION DELIVERED IN  
THE COURT BELOW**

No opinion was rendered in the United States District Court for the Southern District of Alabama. The opinion of the United States Court of Appeals for the Fifth Circuit, which is the opinion to be reviewed in this cause, is reported as *Parden v. Terminal Railway of the Alabama State Docks Department*, 311 F.2d 727 (1963).



## B.

**GROUND'S OF JURISDICTION OF THIS COURT**

1. Jurisdiction to review the judgment or decree in question by Writ of Certiorari in this Court is based upon Title 28, U.S.C. §1254(1), 62 Stat. 928:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:"

"(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree;"

2. The judgment entry of the United States Court of Appeals for the Fifth Circuit adverse to petitioners was made and entered on January 3, 1963. (R. 103)

3. Petitioners filed a timely petition for rehearing on January 23, 1963. (R. 104)

4. The order of the United States Court of Appeals for the Fifth Circuit overruling the application of petitioners for a rehearing in said Court was entered on February 27, 1963. (R. 104)

5. Petitioners filed their petition for Writ of Certiorari in this Court on May 24, 1963.

6. The order of this Court granting the petition for Writ of Certiorari was entered on October 14, 1963. (R. 105)

## C.

**CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

Several statutes and constitutional provisions are involved, and since they are lengthy for the most part,

citations alone will be inserted at this point, and their pertinent texts are set forth in the appendix.

45 U.S.C., §51; 35 Stat. 65; 53 Stat. 1404.

45 U.S.C., §56; 35 Stat. 66, as amended in 36 Stat. 291, 36 Stat. 1167, 53 Stat. 1404, and 62 Stat. 989.

45 U.S.C., §1; 27 Stat. 531.

45 U.S.C., §2; 27 Stat. 531.

Alabama Constitution of 1901, Amendment No. 12 (Mobile Port Amendment), 1940 Code of Alabama, (Recompiled, 1958), Volume 4, p. 351.

Alabama Constitution of 1901, Amendment No. 116 (State Works of Internal Improvement Along Navigable Waterways and Indebtedness Therefor), 1940 Code of Alabama (Recompiled, 1958), Volume 1, p. 431.

1940 Code of Alabama (Recompiled, 1958), Title 38, §17.

1940 Code of Alabama (Recompiled, 1958), Title 38, §45 (14, 16).

United States Constitution, Art. One, Section 8, cl. 3 (Commerce Power).

#### D.

### QUESTIONS PRESENTED FOR REVIEW

The questions presented for review in this cause may be stated as follows:

1. Is an employee of an interstate common carrier railroad to be deprived of his remedy of suit for personal injuries under the Federal Employers' Liability Act in a United States District Court because the railroad is owned and operated by the State of Alabama, of which the employee is a citizen, which state invokes a claim of immunity from such suits?

2. Whether the State of Alabama, admittedly engaged in the business of operating a common carrier railroad in interstate and foreign commerce, is amenable to suit in a United States District Court by its citizen-employees who seek to recover damages under the Federal Employers' Liability Act and/or the Federal Safety Appliance Acts for injuries sustained in performance of duties for such railroad.

E.

### STATEMENT OF THE CASE

Petitioners were plaintiffs in separate suits filed in the United States District Court for the Southern District of Alabama, all of which were brought against the Terminal Railway of the Alabama State Docks Department, an agency of the State of Alabama, which admittedly is a common carrier railroad for hire doing business in interstate commerce between the several states and between the United States and foreign countries. All sought damages under the Federal Employers' Liability Act on account of injuries sustained by employees of Terminal Railway while engaged in their employment with Terminal Railway and while engaged in such interstate commerce. These employees were citizens of the State of Alabama. (R. 4-10)

Jurisdiction of the United States District Court was based upon the Federal Employers' Liability Act, 45 U.S.C., §51, *et seq.*, and particularly Section 6 thereof, 45 U.S.C., §56, which authorizes commencement of suits under the FELA in District Courts of the United States.

In each of such actions, the State of Alabama appeared specially and moved to dismiss the suits on the ground that the Terminal Railway is an agency of the State of

Alabama, and the State of Alabama could not be sued on these causes of action in the United States District Court. (R. 12-13, 26) In response to such motions to dismiss, the District Court dismissed all five suits (R. 58-60), and petitioners appealed to the United States Court of Appeals for the Fifth Circuit (R. 60), their cases being consolidated on appeal. (R. 61) The action of the District Court was affirmed by the Court of Appeals (R. 89-104), and petitioners' timely application for rehearing (R. 104) was overruled. (R. 104) Petition for Writ of Certiorari was filed in this Court on May 24, 1963 and granted on October 14, 1963. (R. 105)

The Terminal Railway was and is fully owned and operated by the State of Alabama (R. 25-26) and consists of about 50 miles of railroad track in the area adjacent to the Alabama State Docks at Mobile, Alabama. (R. 37; Pl. Exs. 1, 2, and 3, R. 44, 55-57) It serves, in addition to the State Docks, several industries located in the area, and it operates an interchange railroad yard where cars are exchanged between the Alabama, Tennessee and Northern Railroad Company, Louisville & Nashville Railroad Company, Southern Railway Company, and Gulf, Mobile & Ohio Railroad Company. (R. 40) The principal source of revenue of the Terminal Railway is for switching services rendered to other railroads, a charge being made for these services. (R. 43) About three to four hundred cars a day are handled by Terminal Railway in that portion of its operation. (R. 43) It also delivers freight to and from shipping which comes into or departs from the Alabama State Docks on vessels arriving from or departing to foreign countries. It owns its own equipment and employs 130 people. (R. 44) It has contracts and working agreements with the various railroad brotherhoods (R. 48), one of which provides regulations regarding the conduct of employees in divulg-

ing information concerning cases arising under the Federal Employers' Liability Act. (R. 58) It reports to the Interstate Commerce Commission concerning injuries sustained by its employees (R. 49-50), and keeps its accounts so as to comply with Interstate Commerce Commission regulations. (R. 52)

These actions<sup>1</sup> were brought under the theory that Terminal Railway is a common carrier by railroad engaging in commerce between the several states, and fails within the provisions of the Federal Employers' Liability Act, Title 45, U.S.C., §51, which states that "**Every common carrier by railroad** while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce \* \* \* for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery \* \* \* or other equipment." (Emphasis supplied) Petitioners contend that the all inclusive word "**every**", as used in the statute, includes railroads operated by states of the United States. Concurrent jurisdiction of actions under the statute is conferred upon state and federal courts by 45 U.S.C., §56.

---

1. R. B. Parden filed two of the suits, one for personal injuries sustained July 13, 1958 (R. 7), and another for personal injuries sustained June 3, 1958 (R. 62); Otto Driskell sued for injuries sustained on July 22, 1958 (R. 68); Mrs. Elizabeth W. Wiggins and Frank O. Burge, Jr., as Administrators of the Estate of John Ervin Wiggins, deceased, sued for injuries sustained by Mr. Wiggins on November 15, 1958 (R. 74); and Aubrey E. Price sought damages for injuries he sustained on October 2, 1959. (R. 81) All of the suits were based upon 45 U.S.C., §51 *et seq.*, and two of them incorporated separate counts based upon violations of the Federal Safety Appliance Acts, 45 U.S.C., §1 *et seq.*



F.

## BRIEF OF THE ARGUMENT

### Proposition I.

The State of Alabama, by constitutional amendment and statute, is authorized to operate this railroad as though it were an ordinary common carrier.

Alabama Constitution, 1901, Amendment No. 12.

Alabama Constitution, 1901, Amendment No. 116.

1940 Code of Alabama (Recompiled, 1958), Title 38, §17.

1940 Code of Alabama (Recompiled, 1958), Title 38, §45 (14, 16).

### Proposition II.

Every common carrier by railroad engaged in interstate commerce is under and subject to the Federal Employers' Liability Act and the Federal Safety Appliance Acts.

Title 45, U.S.C., §51, *et seq.*

Title 45, U.S.C., §1, *et seq.*

### Proposition III.

A state operated railroad facility is under and subject to the Federal Safety Appliance Acts and the Railway Labor Act, and therefore should fall under the equally all embracing terms of the Federal Employers' Liability Act.

Title 45, U.S.C., §51, *et seq.*

Title 45, U.S.C., §1, *et seq.*

*U. S. v. California*, 297 U.S. 175, 80 L. Ed. 567, 56 S. Ct. 421.

*California v. Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037.

*Petty v. Tennessee-Missouri Bridge Com.*, 359 U.S.  
275, 3 L. Ed. 2d 804, 79 S. Ct. 785.

*Maurice v. State*, 43 Cal. App. 2d 270, 110 P.2d 706  
(Cal. Dist. Ct. of App.).

#### **Proposition IV.**

The several states of the United States have granted to the federal government the exclusive right and power to regulate interstate commerce, and acting on such power, the congress has, by the Safety Appliance Acts and the Federal Employers' Liability Act, regulated the liability of interstate common carrier railroads to their employees, and any state laws or constitutional provisions, which conflict with these congressional enactments, are inoperative to the extent that they so conflict.

U. S. Constitution, Commerce Clause.

Title 45, U.S.C., §1, *et seq.*

Title 45, U.S.C., §51, *et seq.*

Cases cited under Proposition III.

G.

#### **ARGUMENT**

This case presents the unique situation of a railroad which is subject to the Federal Safety Appliance Acts (which refer to "**any common carrier engaged in interstate commerce by railroad**") and the Railway Labor Act (which refers to "**any carrier by railroad**, subject to the Interstate Commerce Act"), yet it is effectively escaping the consequences of the Federal Employers' Liability Act which provides that "**every common carrier by railroad**" is subject to suit under the act in the District Courts of the United States.

In our statement of the facts, we have pointed out sufficient portions of the record to clearly show that the

Terminal Railway, an agency of the State of Alabama, is engaged in extensive profitable operations as a common carrier by railroad for hire in commerce between the several states and between the various states and foreign nations. There is no dispute on this point, and we consider it needless to go further into the facts in that regard in order to show that this railroad fits within the definition of railroads bound by the F.E.L.A.

The operation of this railroad is authorized by two amendments to the constitution of the State of Alabama, as well as by statutes enacted by the Alabama legislature. By virtue of Amendment No. 12 to the Alabama Constitution of 1901, the state is authorized to "engage in the work of internal improvement, or promoting, developing, constructing, maintaining and operating all harbors and sea ports within the state or its jurisdiction." (App. E) By virtue of Amendment No. 116 to the Alabama Constitution of 1901, the state is authorized to maintain and operate along navigable streams or waterways "all manner of docks, facilities, elevators, warehouses, water and rail terminals and other structures and facilities and improvements needful for the convenient use of same, in aid of commerce and use of the waterways of the state." (App. F) The legislature, through Title 38, §17 of the 1940 Code of Alabama (Recompiled, 1958), has authorized the Alabama State Docks Department to "acquire, control and operate a line of terminal railroads and to carry passengers, goods, wares and merchandise upon the tracks of such railroads and to connect with or cross any other railroad upon the payment of just compensation and to receive, deliver to and transport the freight, passengers, and cars of common carrier railroads **as though it were an ordinary common carrier.**" (Emphasis supplied.) (App. G) Similar authority is expressed in Title 38, §45 (14, 16) of the 1940 Code of Alabama (Recompiled, 1958). (App. H)

Thus, the State of Alabama has placed this agency in the category of a common carrier by railroad engaging in commerce between the several states and between the states and foreign nations. It is in a profit making business for a good and legitimate purpose. By engaging in such business, it necessarily is subjected to certain obligations, duties and liabilities, among which is the duty to respond in damages to its injured employees under the terms of the federal statutes enacted for the benefit and protection of those employees.

The pertinent portions of the Federal Employers' Liability Act, Title 45, U.S.C., §51 (App. A) read as follows:

**"Every common carrier by railroad while engaging in commerce between any of the several states \* \* \* or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce \* \* \***

**"Any employee of a carrier, any part of whose duties as such employees shall be in furtherance of interstate or foreign commerce \* \* \* shall be considered as entitled to the benefits of this chapter." (Emphasis supplied)**

Title 45, U.S.C., §56 (App. B), provides that actions under the Federal Employers' Liability Act may be brought in a District Court of the United States.

By the Commerce Clause of the United States Constitution, Art. I, §8, Cl. 3 (App. I), the states have delegated to the federal government the exclusive power to regulate commerce with foreign nations and among the several states. The Congress has exercised the power thus delegated by passing several acts relating to interstate common carrier railroads, regulating the operation of such railroads

through the Railway Labor Act, the Safety Appliance Acts, and the Federal Employers' Liability Act. These acts, by their terms, do not exclude from their operation a railroad operated by a sovereign state, but, to the contrary, apply to "every" common carrier or "any" common carrier. They are all inclusive in scope. Congress has thus prescribed the conditions under which any entity may engage in the interstate railroad business as a common carrier. The State of Alabama, by establishing an agency to operate such a railroad, has thereby subjected such railroad to all of the obligations, liabilities and regulations fixed by Congress upon such railroads. Congress has said that such railroads are liable to their employees under the Federal Employers' Liability Act, and has not excepted state operated railroads from the provisions of the act. In effect, Congress so regulated interstate commerce as to permit the State of Alabama to **conditionally** engage in interstate commerce as a common carrier railroad, and one of those conditions is that it is amenable to suit in a United States District Court by an employee who is injured under circumstances falling within the Federal Employers' Liability Act. That condition was accepted by Alabama, and in so doing, the State of Alabama subordinated any rights and immunities which it might otherwise have had to the laws of the United States applicable to the operation of an interstate common carrier railroad.

The State of California operates a similar railroad facility known as the "State Belt Railroad," and this Court, in *U. S. v. California*, 297 U.S. 175, 80 L. Ed. 567, 56 S. Ct. 421, held that railroad to be subject to the provisions of the Federal Safety Appliance Act. (The facts there are distinguishable from those in the cases at bar in that the United States brought suit to recover the statutory penalty for a violation of the Safety Appliance Act.) The Court



pointed out that it was considered unimportant to say whether the state conducts its railroads in its "sovereign" or in its "Private" capacity, and further, that the only question necessary to be considered is whether the exercise of the power to operate the railroad must be in subordination to the power to regulate interstate commerce, which the states have granted to the federal government. The Court further said:

"The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the constitution. (297 U.S. 184, 80 L. Ed. 572)

\* \* \*

"California, by engaging in interstate commerce by rail, has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. **The federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances. \* \* \*. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.** 297 U.S. 185, 80 L. Ed. 573)

\* \* \*

"Since the section which, as we have held, imposes the liability upon state and privately-owned carriers alike, also provides the remedy and designates the manner and the court in which the remedy is to be

pursued, we think the jurisdictional provisions are as applicable to suits brought to enforce the liability of states as to those against privately-owned carriers, and that the district court had jurisdiction." (297 U.S. 188, 80 L. Ed. 575) (Emphasis supplied).

The same State Belt Railroad was involved in *California v. Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037. Again the facts are distinguishable in that the action was brought by employees of the railroad to compel the National Railroad Adjustment Board to take jurisdiction of plaintiffs' claims under a collective labor agreement. The State of California intervened, contending that the Railway Labor Act, 45 U.S.C., §§151, et seq., does not apply to a common carrier by railroad owned by a sovereign state and operated in interstate commerce.

The Court pointed out that the Railway Labor Act applies to "any carrier by railroad, subject to the Interstate Commerce Act \* \* \*." (The Federal Employers' Liability Act uses the word "every" rather than "any" and does not mention the Interstate Commerce Act.) It cited *U. S. v. California*, *supra*, where it was unequivocally held that the Safety Appliance Act was applicable to this state operated railroad, pointed out that other courts have ruled that the Federal Employers' Liability Act, "the coverage of which corresponds to that of the Safety Appliance Act," was applicable to public railroads, and held that the fact that Congress chose to phrase the coverage of the Railway Labor Act in all-embracing terms indicates that state railroads were included within it.

California contended that Congressional intent to include state railroads within the act was doubtful because certain other federal statutes governing employer-employee relationships expressly exempted employees of the United

States or of a state. To that argument, the Supreme Court said:

"We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees." (353 U.S. 564, 1 L. Ed. 2d 1041)

California contended that Congress has no constitutional power to interfere with the sovereign right of a state to control its employment relationships in connection with the operation of such railroad. Citing *U. S. v. California, supra*, the Court said that the State of California, though acting in its sovereign capacity in operating the railroad, necessarily so, acted in subordination to the power to regulate interstate commerce which has been specifically granted to the federal government and, therefore, became subject to the Safety Appliance Act and the Railway Labor Act. "If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships." (353 U.S. 568, 1 L. Ed. 2d 1044).

Thus it is demonstrated that state operated common carrier railroads are subject to two of the three primary acts of Congress which regulate and govern the rights of railroad employees as against their employers. The third of such acts is the Federal Employers' Liability Act. California's state courts have recognized that the F.E.L.A. applies to its State Belt Railroad. *Maurice v. State*, 43 Cal. App. 2d 270, 110 P.2d 706 (Cal. Dist. Ct. of App.). It is inconceivable that this clearly established pattern should be varied so as to hold that a state which has chosen to be-

come a common carrier, in every sense within the definition set out in the Federal Employers' Liability Act, is immune from liability thereunder in the federal courts.

In the court below, opposing counsel relied successfully upon constitutional and inherent immunity of a sovereign state from suits against it, and presumably the same contention will be made here. We respectfully submit that by engaging in such a commercial enterprise as is demonstrated by the record in this case, the entry into which Congress has made conditioned upon the acceptance of the responsibilities and liabilities imposed by the Federal Employers' Liability Act, the State of Alabama waived and relinquished any immunity which it otherwise might have had. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785.

The Petty case involved an action brought under the Jones Act against a bi-state corporation created by the States of Tennessee and Missouri with the approval of Congress. The Commission claimed immunity to suit under the Jones Act by virtue of the Eleventh Amendment. This Court held that in creating the agency, the States of Tennessee and Missouri waived any immunity which they otherwise might have had. The case was decided upon the basis of the corporate provisions and the act of Congress which approved the creation of the bi-state agency but it is nevertheless persuasive authority for the position of the plaintiffs in these cases. To the contention that the acceptance of jurisdiction of such a case was an enlargement of the jurisdiction of the federal courts, the Court said:

"This is not enlarging the jurisdiction of the federal courts but only recognizing as one of its appropriate applications the business activities of an agency active in commerce and maritime matters." (359 U.S. 281, 3 L. Ed. 2d 810).

As to the right of the plaintiff to recover under the Jones Act, the Court said:

"Finally we can find no more reason for excepting state or bi-state corporations from 'employer' as used in the Jones Act than we could for excepting them either from the Safety Appliance Act (*United States v. California*, 297 U.S. 175, 80 L. Ed. 567, 56 S. Ct. 421) or the Railway Labor Act (*California v. Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037). In the latter case we reviewed at length federal legislation governing employer-employee relationships and said 'When Congress wished to exclude state employees, it expressly so provided.' 353 U.S. at 564. The Jones Act (46 U.S.C., §688) has no exceptions from the broad sweep of the words 'Any seaman who shall suffer personal injury in the course of his employment may' etc. The rationale of *United States v. California*, (U.S.) supra, and *California v. Taylor*, (U.S.) supra, makes it impossible for us to mark a distinction here and hold that this bi-state agency is not an employer under the Jones Act." (359 U.S. 282, 3 L. Ed. 2d 810)

The record shows that Terminal Railway has recognized that it is subject to the requirements of the Interstate Commerce Commission. It further shows that in the agreement setting out rules governing Terminal Railway employees, it recognized that its employees may sustain injury under circumstances which will give rise to a cause of action under the Federal Employers' Liability Act. Paragraph No. 1308 of this agreement is set forth on page 58 of the record. This rule regulating the making of statements concerning accidents, claims or suits is obviously worded so as to avoid conflict with the provisions of Title 45, U.S.C., §60, which prohibits any common carrier from making any contract, rule, or regulation, which would have the purpose, intent, or effect of preventing employees from



voluntarily furnishing information concerning a case arising under the Federal Employers' Liability Act.

In view of these authorities, it appears unquestionable that these appellants have rights under the Federal Safety Appliance Act and the Federal Employers' Liability Act. Somewhere there must be a remedy for the enforcement of those rights. It is axiomatic that for every right there is a remedy. The remedy is prescribed in Section 6 of the Federal Employers' Liability Act (Title 45, U.S.C., §56), where jurisdiction of causes of action under the Act is given to district courts of the United States with proper venue.

The effort to deprive appellants of their remedy on the basis of constitutional or inherent immunity of sovereign states from suits is but avoidance of the issue. By bringing its Terminal Railway within the provisions of the Federal Employers Liability Act, the State of Alabama subjected it to all of the provisions of that Act, and conferred upon appellants all rights prescribed in the Act. In order to determine whether immunity applies, we must first look to the right asserted. The remedy of suit against the employer in a United States district court is a necessary and vital part of the rights afforded appellants by the Act, and therefore, we do not reach the question of immunity.

H.

## CONCLUSION

The position of petitioners may be summarized as follows:

1. In delegating to the federal government the exclusive power to regulate interstate commerce, the states vested in Congress the right to regulate all interstate railroads, whether state or privately operated.

2. In so doing, the states necessarily surrendered any sovereign immunity which may conflict with valid regulations of Congress which are applicable to state operated railroads.

3. Congress having made the FELA applicable to "every common carrier by railroad", which necessarily includes state operated railroads, states thereafter choosing to engage in an interstate railroad business must be considered as having entered into such enterprise in full subordination to the all-embracing terms of the FELA, a portion of which subjects such railroad to suits in District Courts of the United States.

These appellants, if the Court of Appeals is correct, belong to the only class of railroad employees in the United States who have no recourse against their employer for injuries sustained in the course of their employment. The loss of limb or life due to negligence or violation of the Safety Appliance Acts by this railroad must not be permitted to go uncompensated. Otherwise, to its employees, the laws enacted for their protection are meaningless.

Respectfully submitted,

---

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**CERTIFICATE OF SERVICE**

I hereby certify that I have mailed a copy of the foregoing brief and argument of appellants, postage prepaid and correctly addressed, to each of the following: Honorable Richmond M. Flowers, Attorney General of the State of Alabama, Montgomery, Alabama and Mr. Willis C. Darby, Jr., Attorney at Law, First National Bank Building, Mobile, Alabama.

This the ..... day of December, 1963.

---

AL G. RIVES,

*Attorney for Appellants.*

## **APPENDIX**

## APPENDIX A

## 45 U.S.C., § 51

**§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr.



22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

## **APPENDIX B**

### **45 U.S.C., § 56**

#### **§ 56. Actions; limitations; concurrent jurisdiction of courts**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

## **APPENDIX C**

### **45 U.S.C., § 1**

#### **§ 1. Driving-wheel brakes and appliances for operating train-brake system**

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such

### **A3**

traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. Mar. 2, 1893, c. 196, § 1, 27 Stat. 531.

## **APPENDIX D**

### **45 U.S.C., § 2**

#### **§ 2. Automatic couplers**

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, § 2, 27 Stat. 531.

## **APPENDIX E**

### **Alabama Constitution of 1901, Amendment 12**

#### **MOBILE PORT AMENDMENT.**

Section 93. The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such, except as may be authorized by the Constitution of Alabama or amendments thereto; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation, except as may be expressly authorized by the Constitution of Alabama, or amendments thereto; but when authorized by laws passed by the legislature the state may appropriate funds to be applied to the construction, repair,

and maintenance of public roads, highways and bridges in the state; and when authorized by appropriate laws passed by the legislature the state may at a cost of not exceeding ten million dollars engage in the work of internal improvement, or promoting, developing, constructing, maintaining, and operating all harbors and seaports within the state or its jurisdiction, provided, that such work or improvement shall always be and remain under the management and control of the state, through its state harbor commission, or other governing agency. The adoption of this amendment shall not affect in any manner any other amendment to the Constitution of Alabama which may be adopted pursuant to any act or resolution of this session of the legislature.

## **APPENDIX F**

### **Alabama Constitution of 1901, Amendment 116.**

#### **STATE WORKS OF INTERNAL IMPROVEMENT ALONG NAVIGABLE WATERWAYS AND INDEBTEDNESS THEREFOR.**

In addition to the authority heretofore granted it by section 93 of this Constitution as amended, and notwithstanding the provisions of section 213 of this Constitution as amended, and when authorized by appropriate laws passed by the legislature, the state may, at a cost of not exceeding an additional ten million dollars engage in works of internal improvement by promoting, developing, constructing, maintaining and bperating along navigable streams or waterways now or hereafter existing within the state all manner of docks, facilities, elevators, warehouses, water and rail terminals and other structures and facilities and improvements needful for the convenient use of the same, in aid of commerce and use of the water-

ways of the state; provided that any such work or improvements shall always be and remain under the management and control of the state through the Alabama state docks department or other state governing agency. When authorized by appropriate laws passed by the Legislature, the state may become indebted in an aggregate principal amount of not exceeding \$10,000,000 for the purpose of carrying out the provisions of this amendment and may cause to be issued its general direct obligation bonds for the repayment of such indebtedness and interest thereon and pledge the faith and credit of the state thereto.

## APPENDIX G.

### 1940 Code of Alabama (Recompiled 1958)

#### Title 38, § 17

§ 17. State may acquire, etc., terminal railroads.-- The state through the department shall have the power and authority to acquire, own, lease, locate, install, construct, hold, maintain, control and operate at seaports a line of terminal railroads with necessary sidings, turn outs, spurs, branches, switches, yard tracks, bridges, trestles, and causeways and in connection therewith or appurtenant thereto shall have the further right to lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyances or appliance necessary or proper to carry passengers, goods, wares, and merchandise over, along or upon the tracks of such railroads or other conveyances. And the state, acting through the said department, shall have the right and authority to make agreements as to scale of wages, seniority and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the opera-

tion of the terminal railroads provided for in this section, and the service and equipment pertinent thereto. And should the said department exercise the authority herein given then in such event it shall be the duty of the said department to make such agreements with said employees hereinabove specified, in accordance with the act of congress known as the Railway Labor Act (U.S.C., Title 45, sections 151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby. The state, acting through the said department, shall have the right and authority with its terminal railroads to connect with or cross any other railroad upon the payment of just compensation and to receive, deliver to and transport the freight, passengers, and cars of common carrier railroads as though it were an ordinary common carrier. (1923, p. 330; 1927, p. 1; 1935, p. 821; 1936, Ex. Sess. p. 57.)

## APPENDIX H

### 1940 Code of Alabama (Recompiled 1958)

#### Title 38, § 45 (14, 16)

§ 45 (14). Authority of state and state docks department.—In addition to the authority granted to the state of Alabama by the provisions of section 93 of the Constitution of Alabama as amended, and any other laws of this state, the state is hereby expressly authorized and empowered to engage in works of internal improvement by promoting, developing, constructing, maintaining and



operating along navigable rivers, streams or waterways now or hereafter existing within this state, all manner of dock facilities, elevators, compresses, warehouses, water and rail terminals, and other structures and facilities and improvements of every kind needful for the convenient use of same, in aid of commerce and use of the waterways of this state, provided, however, that all such works, improvements and facilities shall always be and remain under the management and control of the Alabama state docks department. The Alabama state docks department shall be the agency of the state under which the state shall accomplish all the purposes of this chapter and the acquisition, construction, maintenance and operation of all the improvements and facilities acquired or constructed or enlarged pursuant to the provisions of this chapter. (1957, p. 409, § 1.)

**§ 45 (16). Authority to acquire, construct, maintain, etc., facilities.**—Through the Alabama state docks department, the state, in engaging in the works of internal improvements authorized by this chapter, shall have the power to acquire, purchase, install, lease, construct, own, hold, maintain, equip, control and operate along navigable rivers, streams or waterways and at river ports or landings along navigable rivers, streams or waterways now or hereafter existing within the state, wharves, piers, docks, quays, grain elevators, cotton compresses, warehouses, improvements and water and rail terminals and such structures and facilities as may be needful for convenient use of the same, in aid of commerce and use of navigable waterways of the state, to the fullest extent practical and as the state docks department shall deem desirable or proper. This authority shall include dredging of approaches to any facilities acquired, erected, maintained or operated pursuant to this chapter; provided, however,

that before the state docks department shall exercise the authority invested in it hereby, the director of state docks shall first submit plans, including estimates of cost, prepared by competent engineers or architects, and a survey made by competent independent and professional engineers showing the economic feasibility of exercising its authority, to the governor for his approval or disapproval in reference thereto, and, as to dredging, the state docks director shall likewise confer with proper United States authorities; provided, the state docks department shall have no authority to condemn or acquire by exercise of the right of eminent domain any privately owned ports, terminal, docks or loading facilities located on any navigable river or stream except at the port of Mobile. (1957, p. 409, § 3.)

#### **APPENDIX I**

##### **United States Constitution, Art. I, § 8, cl. 3**

##### **(Commerce Power)**

"The Congress shall have the Power \* \* \* To regulate Commerce with foreign Nations and among the several States \* \* \*"

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**OCTOBER TERM, 1963.**

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**No. 157**

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**R. B. PARDEN, ET AL.,**

**Petitioners,**

**versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL.,**

**Respondents.**

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**On Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.**

---

**BRIEF OF RESPONDENTS.**

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**RICHMOND M. FLOWERS,**  
As Attorney General of the State  
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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1963.**

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**No. 157.**

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**R. B. PARDEN, ET AL.,**

**Petitioners,**

**versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL.,**

**Respondents.**

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**On Writ of Certiorari to the United States Court of  
Appeals for the Fifth Circuit.**

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**BRIEF OF RESPONDENTS.**

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**I.**

**OPINION BELOW.**

The United States District Court for the Southern District of Alabama did not render an opinion. The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the United States District Court for the Southern District of Alabama, is reported



as *Parden v. Terminal Railway of the Alabama State Docks Department*, 5 Cir., 1963, 311 F.2d 727; reprinted in Appendix I hereof.

## II.

### QUESTION PRESENTED FOR REVIEW.

May the State of Alabama be sued without its consent by a citizen of the State of Alabama in a district court of the United States on a claim based upon the Federal Employers' Liability Act for damages for personal injuries sustained by the citizen while employed by a railroad owned and operated by the State of Alabama as a common carrier engaged in interstate commerce?

## III.

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

In addition to those constitutional provisions and statutes specified in the petitioners' brief the following are involved:

CONSTITUTION OF THE UNITED STATES,  
ARTICLE III, SECTION 2, CLAUSE 1.

### JURISDICTION OF COURTS.

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,

or which shall be made, under their Authority;—  
to all Cases affecting Ambassadors, other public  
Ministers and Consuls;—to all Cases of admiralty  
and maritime Jurisdiction;—to Controversies to  
which the United States shall be a Party;—to  
Controversies between two or more States;—  
between a State and Citizens of another State;—  
between Citizens of different States;—between  
Citizens of the same State claiming Lands under  
Grants of different States, and between a State,  
or the Citizens thereof, and foreign States, Citizens  
or Subjects.

#### CONSTITUTION OF THE UNITED STATES, AMENDMENT XI.

The judicial power of the United States shall  
not be construed to extend to any suit in law or  
equity, commenced or prosecuted against one of  
the United States by Citizens of another State, or  
by Citizens or Subjects of any Foreign State.

#### CONSTITUTION OF ALABAMA, 1901, ARTICLE 1, SECTION 14.

That the State of Alabama shall never be made  
a defendant in any court of law or equity.

#### CODE OF ALABAMA 1940 (RECOMPILED 1958) TITLE 55, SECTION 333

Printed in Appendix II

#### CODE OF ALABAMA 1940 (RECOMPILED 1958) TITLE 55, SECTION 334

Printed in Appendix III

OPINION OF THE ATTORNEY GENERAL  
STATE OF ALABAMA.

(JAN-MARCH, 1940 P. 286)

Printed in Appendix IV

IV.

STATEMENT OF THE CASE.

Parden and the other petitioners, all citizens of the State of Alabama, brought separate actions in the district court against the Terminal Railway of the Alabama State Docks Department for injuries sustained while employed on the Terminal Railway. (R. 4 et seq., 62 et seq., 68 et seq., 74 et seq., 81 et seq., 90 et seq.) The complaints alleged that jurisdiction was based upon the Federal Employers' Liability Act, 35 Stat. 65 et seq., 53 Stat. 1404 et seq., 45 U.S.C.A. 51 et seq. (R. 8, 63, 69, 75-6, 82, 90) and that the Terminal Railway was a department "within the Government of the State of Alabama." (R. 8, 63, 69, 75, 82.)

The State of Alabama appeared specially and moved to quash the return of service and dismiss the actions on the ground, among others, that the judicial power of the United States does not extend to controversies between citizens of a state and a state. (R. 12, 26.) The district court granted the motions after a hearing on the pleadings, depositions and affidavits. (R.

59-60.) The United States Court of Appeals for the Fifth Circuit affirmed. (R. 89 et seq.)

"The Terminal Railway was and is wholly owned and operated by the State of Alabama, consists of about fifty miles of railroad tracks in the area adjacent to the Alabama State Docks at Mobile, Alabama, serving in addition several industries situated in the general vicinity, and operating an interchange railroad with Alabama, Tennessee and Northern Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company and Gulf, Mobile and Ohio Railroad Company. A large percent of its operations are in interstate commerce; and it has contracts and working agreements with the various railroad brotherhoods, and makes reports to the Interstate Commerce Commission concerning injuries sustained by its employees, and keeps its accounts so as to comply with the regulations of the Interstate Commerce Commission." (R. 91.)

## V.

### SUMMARY OF ARGUMENT.

Parden does not contest the "established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission"; and a suit against a sovereign state cannot be entertained in the federal courts upon the ground that the controversy arises under the Constitution or laws of the

United States. *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991, 992; *Hans v. Louisiana*, 134 U.S. 1, 10, 16, 33 L. Ed. 842, 845, 847; *Monaco v. Mississippi*, 292 U.S. 313, 329, 78 L. Ed. 1282, 1289; *Missouri v. Fiske*, 290 U.S. 18, 25, 78 L. Ed. 145, 149.

Parden contends that Congress so regulated interstate commerce as to permit the State of Alabama to engage in interstate commerce only upon condition that the State of Alabama be amenable to suit in the federal courts under the Federal Employers' Liability Act, 35 Stat. 65 et seq., 53 Stat. 1404 et seq., 45 U.S.C. 51 et seq. Parden's argument presupposes (1) that Congress intended to condition a state's engaging in interstate commerce by rail upon the state's abandoning its constitutional immunity from suit in federal courts on causes of action arising under the Federal Employers' Liability Act and (2) that Congress has the constitutional power to strip a state of immunity from suit as a prerequisite to the state's engaging in interstate commerce as a common carrier by rail.

The legislative history of the Federal Employers' Liability Act reveals that its purpose was "to change the common-law liability of employers of labor for personal injuries"; nothing in the legislative history of the Federal Employers' Liability Act indicates an intention to create new and unheard of remedies, by subjecting sovereign states to actions in the federal courts by individuals because a sovereign state engaged in interstate commerce by rail. H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1906) 42 Cong. Rec. 4426-4439, 4526-4551 (1908).



Assuming arguendo, that Congress intended to condition a state's engaging in interstate commerce by rail upon the state being amenable to suit in a federal court under the Federal Employers' Liability Act, such a condition is beyond the power of Congress, unconstitutional and void. "The inherent nature of sovereignty prevents actions against a state by its own citizen without its consent." *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 51, 88 L. Ed. 1121, 1125. Congress does not have the power to require a state to be amenable to suit in a federal court. U.S. Const. art. III § 2, Cl. 1; U.S. Const. amend. XI. Congress cannot impose a condition upon a state's engaging in interstate commerce by rail which is beyond the power of Congress to impose directly. *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 502-3, 52 L. Ed. 297, 310-11. Congress may not require a state to sacrifice, waive or surrender its constitutional immunity from suit any more than a state can condition a foreign corporation's doing business in the state on the sacrifice of a right guaranteed by the Constitution of the United States. *Hanover Fire Insurance Company v. Harding* (*Hanover Fire Insurance Company v. Carr*) 272 U.S. 494, 514-5, 517, 71 L. Ed. 372 382-3; *The Home Insurance Company of New York v. Morse*, 20 Wall. 445, 453-8, 22 L. Ed. 365, 369-70; *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 571; 93 L. Ed. 1544, 1551.

Reason and authority compel the conclusion that Congress neither has the power to or intended to strip the sovereign State of Alabama of its constitu-

tional immunity from suit by its own citizens when Congress enacted the Federal Employers' Liability Act.

## VI.

### ARGUMENT.

#### A.

**The Federal Employers' Liability Act Does Not Create A Cause Of Action Against A State Or Confer Jurisdiction On Federal Courts To Entertain An Action Against A State Without Its Consent.**

Parden's argument assumes that Congress by enacting the Federal Employers' Liability Act intended to create a cause of action against a sovereign state engaging in interstate commerce by rail as a common carrier.

The legislative history of the Federal Employers' Liability Act conclusively shows that Congress did not intend to subject a sovereign state to suit in the courts of the United States by its employees merely because the state happened to be engaging in interstate commerce by rail. The House Report, H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) states:

The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an

employee, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. It permits a recovery by an employee for an injury caused by the negligence of a coemployee; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury.

The debate in the Senate, 42 Cong. Rec. 4526 et seq., particularly 4532, 4534-5 and 4539-42 (1908) conclusively shows that the Senate was particularly concerned about the constitutionality of the Act and although much was said of this Court's decision in *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 52 L. Ed. 297, declaring the First Employers' Liability Act unconstitutional, nothing whatsoever was said about the then unique proposition that Congress had the power to annul the Constitution of the United States and to strip a sovereign state of its immunity from suit.

A subsequent Act of Congress and decisions of this Court established beyond doubt that the term "common carrier by railroad" as used in the Federal Employers' Liability Act did not include the operation of a railroad by a sovereign. Congress in the Federal Control Act, 40 Stat. at L. 451, provided that suits under the Federal Employers' Liability Act, among others, could be brought directly against the United States when the United States federalized and operated the railroads. This Court in *Dahn v. Davis*, 258 U.S. 421, 66 L. Ed. 696, and *Johansen v. United States*, 343 U.S. 427, 438-9, 96 L. Ed. 1051, 1059-60 recognized that the

liability of the United States under the Federal Employers' Liability Act during federal operation of the railroads was based upon the Federal Control Act.

There is little doubt that had Parden been employed by the United States in the operation of a common carrier by rail at the time of his alleged injury, Parden would not have a cause of action against the United States under the Federal Employers' Liability Act but rather would be entitled to the benefits of the Federal Employees Compensation Act, 39 Stat. 742, 5 U.S.C. Sections 751 et seq. There is nothing in the Federal Employers' Liability Act to justify a distinction between a common carrier by rail operated by a sovereign state and a common carrier by rail operated by the United States.

*United States v. California*, 297 U.S. 175, 80 L. Ed. 567, and *California v. Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, relied upon by Parden, are inapposite to this cause. Neither *California v. Taylor*, *supra*, nor *United States v. California*, *supra*, involved the unique proposition raised here that Congress intended directly or indirectly to strip a sovereign state of its constitutional immunity from suit. *United States v. California*, *supra*, was a suit brought by the United States against California to recover a statutory penalty for violation of the Federal Safety Appliance Act, 27 Stat. at L. 531, 45 U.S.C.A. Section 2 and Section 6. It had long been established when this Court decided *United States v. California*, *supra*, that the judicial power granted by the Constitution of the United States embraced a suit by the United States against a state. *United States*

*v. North Carolina*, 136 U.S. 211, 34 L. Ed. 336; *United States v. Texas*, 143 U.S. 621, 36 L. Ed. 285. In *California v. Taylor*, 353 U.S. 553, 568, 1 L. Ed. 2d 1034, 1044, this Court specifically refused to pass upon the question of whether a state could be sued by an individual to enforce an award of the National Railroad Adjustment Board.

Moreover, Congress did not intend to confer jurisdiction upon the federal courts to entertain an action by a citizen against a state under the Federal Employers' Liability Act.

Section 6 of the Federal Employers' Liability Act 35 Stat. 66 as amended, 45 U.S.C. 56 provides:

Q The jurisdiction of the courts of the United States under this chapter shall be *concurrent with that of the courts of the several States*. (Emphasis supplied.)

The language employed by Congress in conferring jurisdiction on the courts of the United States is in all salient respects identical to the language employed by Congress to confer jurisdiction on the federal courts in matters arising under the Constitution and laws of the United States in the Act of March 3, 1875, namely:

The circuit courts of the United States shall have original cognizance *concurrent with the courts of the several States* of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States . . . (Emphasis supplied.)



In *Hans v. Louisiana*, 134 U.S. 1, 10, 16, 33 L. Ed. 842, 845, 847 this Court held that the Act of March 3, 1875 conferring jurisdiction on the federal courts did not purport to include a grant of jurisdiction to the federal courts to entertain a suit by a citizen against his own state. The compelling factor in the decision in *Hans* was that by the use of the term "concurrent with the courts of the several States", Congress did not intend to invest its courts with any new and strange jurisdiction; that since state courts have no power to entertain suits by individuals against a state without its consent, then the courts of the United States, having only concurrent jurisdiction, did not acquire any such power.

The use of the judiciously interpreted phrase "concurrent with that of the courts of the several States" conclusively establishes that Congress did not intend to confer jurisdiction on the federal courts under Section 6 of the Federal Employers' Liability Act to entertain a suit by a citizen against a state without its consent.

## B.

**Congress May Not Impose A Condition Which Is Repugnant To The Constitution Of The United States As A Pre-requisite To A State's Engaging In Interstate Commerce As A Common Carrier By Rail.**

In *Hans v. Louisiana*, 134 U.S. 1, 33 L. Ed. 842, this Court after full consideration held that a suit against a state, without its consent, by one of its own citizens

was unknown to and forbidden by law and "that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent." *Duhne v. New Jersey*, 251 U.S. 311, 313, 64 L. Ed. 280, 281; *Fitts v. McGhee*, 172 U.S. 516, 524, 529, 43 L. Ed. 535, 539, 541; *Missouri v. Fiske*, 290 U.S. 18, 25, 78 L. Ed. 145, 149; *Monaco v. Mississippi*, 292 U.S. 313, 329-30, 78 L. Ed. 1282, 1289. A suit by a citizen "cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States." *Missouri v. Fiske*, 290 U.S. 18, 26, 78 L. Ed. 145, 149 and cases cited therein. A state's immunity from suit is a "constitutional right". *Great Northern Life Insurance Company v. Read*, 322 U.S. 47, 51, 88 L. Ed. 1121, 1125.

Parden contends that Congress conditioned a state's engaging in interstate commerce by rail as a common carrier upon the state's acceptance of the liabilities imposed by the Federal Employers' Liability Act and that by engaging in interstate commerce by rail as a common carrier, the State of Alabama waived any immunity which it otherwise might have had. Petitioners' Brief Page 15.

Parden's argument presupposes that Congress has the constitutional power to strip a state of its constitutional immunity from suit as a prerequisite to the state's engaging in interstate commerce as a common carrier by rail. Parden's argument involves two dis-

tinct powers. One of these is the power to prohibit a state from engaging in interstate commerce by rail. The other is the power to compel a state to waive its constitutional immunity from suit. Cf. *Frost v. Railroad Commission of the State of California*, 271 U.S. 583, 592-3, 70 L. Ed. 1101, 1104.

Parden does not contend that Congress could directly strip a state of its sovereign immunity from suit by a citizen. Any such contention must fall under the Eleventh Amendment of the Constitution "expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts . . . that the Constitution should not be construed to import any power" to authorize a suit by a citizen against a state without its consent. *Hans. v. Louisiana*, 134 U.S. 1, 11, 33 L. Ed. 842, 846.

May Congress accomplish indirectly, what the Eleventh Amendment would strike down if attempted directly, by imposing a condition that is repugnant to the Constitution?

In analogous situations this Court has held that a legislative body may not impose conditions repugnant to the Constitution on the exercise of a privilege although the legislative body had the authority to deny the privilege outright.

In *Frost v. Railroad Commission of the State of California*, 271 U.S. 583, 593-4, 70 L. Ed. 1101, 1104-5 after holding that under the Fourteenth Amendment a

private carrier cannot be converted against his will into a common carrier by mere legislative command, this Court held that the state could not condition a private carrier's use of the state's roads on the private carrier's assumption against his will of the duties and burdens of a common carrier and thereby accomplish indirectly what it could not do directly, saying:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

This Court has frequently held that although a state has the unqualified right to exclude a foreign corporation from doing business within the state's boundaries, the state may not require the corporation to surrender a right guaranteed by the Constitution of the United

States as a prerequisite to doing business within the state. *Home Insurance Company of New York v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *Hanover Fire Insurance Company v. Harding* (*Hanover Fire Insurance Company v. Carr*) 272 U.S. 494, 71 L. Ed. 372; *Terral v. Burke Construction Company*, 257 U.S. 529, 532-3, 66 L. Ed. 352, 354. Cf. *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 93 L. Ed. 1544. In *Home Insurance Company of New York v. Morse*, 20 Wall. 445, 22 L. Ed. 365, the State of Wisconsin required foreign insurance companies to enter into a written agreement that such company would not remove a suit for trial from the state court into the courts of the United States as a condition of doing business in the State of Wisconsin. This Court held that the company had an unqualified and unrestrained federal right to have cases transferred to the federal courts and therefore the condition was repugnant to the Constitution and laws of the United States, and the agreement being obtained under compulsion was therefore unconstitutional and void. In *Hanover Fire Insurance Company v. Harding*, 272 U.S. 494, 517, 71 L. Ed. 372, 383, this Court specifically rejected the argument that a foreign corporation by coming into a state and engaging in business on the conditions imposed, waives all constitutional restrictions and cannot object to a condition or law regulating its obligations even though as a statute operating in invitum it may be in conflict with constitutional limitations.

This Court in declaring the First Employers' Liability Act unconstitutional specifically rejected the theory that "one who engages in interstate commerce thereby



comes under the power of Congress . . . and may not complain of any regulation which Congress may choose to adopt." *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 499; 502-3, 52 L. Ed. 297, 309, 310-11. *Howard* established that Congress may not indirectly under the guise of regulating interstate commerce require a person to surrender a constitutional right or privilege as a prerequisite to engaging in interstate commerce as a common carrier. We submit that the language of this Court in *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 502-3, 52 L. Ed. 297, 310-11 is applicable here:

It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe; even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would

extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures.

If Congress has the power to impose a condition repugnant to the Constitution as a prerequisite to a state's engaging in interstate commerce, then Congress has the power to regulate every aspect of every state's affairs for today every state in this great nation engages in interstate commerce by the use of the mails and telephones in the day to day conduct of its affairs, each state engages in interstate commerce through its network of roads, each state purchases supplies that move in interstate commerce, and most if not all states market their bonds in interstate commerce. Substantially every activity of a state from aid to dependent children to the conduct of affairs of state affects interstate commerce.

Reason and authority compel the conclusion that Congress lacks power to condition a state's engaging in interstate commerce by rail upon the state's forfeiture of its sovereign immunity from suit.

Parden's argument also assumes that Congress in enacting the Federal Employers' Liability Act intended to condition a state's engaging in interstate commerce by rail upon the state foregoing its immunity from

suit. We recognize that Congress in exercising its power to regulate commerce, may exercise its control over instrumentalities of commerce to prohibit their use to obtain ends that are within its Constitutional powers. *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 437, 442-3, 82 L. Ed. 936, 945, 947-8. However, when Congress has exercised this power Congress has always done so by the use of clear, specific and concise language. 74 Stat. 671, 76 Stat. 1144, 39 U.S.C.A. 4369 (second class mail); 49 Stat. 812, 15 U.S.C.A. 79c (gas, electric energy and use of mails and instrumentalities of commerce); 52 Stat. 1067, 29 U.S.C.A. 212 (interstate transportation of goods produced by oppressive child labor). We have found no case where Congress has forbidden a person from engaging in commerce by implication. We submit that no basis exists here for a presumption that Congress conditioned a state's engaging in interstate commerce by rail upon the state's being amenable to suit in a federal or state court.

### C.

#### **The State Of Alabama Has Not Waived Its Constitutional Immunity From Suit.**

This Court has consistently held that waiver by a state of its sovereign immunity from suit must be clearly shown and that the question of waiver must be determined under state law. *Ford Motor Company v. Dept. of Treas. of Indiana*, 323 U.S. 459, 466-470, 89 L. Ed. 389, 395-8.

Section 14 of the Constitution of the State of Alabama provides:

That the State of Alabama shall never be made a defendant in any court of law or equity.

Under the Constitution of the State of Alabama neither the legislature nor a state officer has the power to waive the State's sovereign immunity from suit. *Dunn Construction Co., Inc. v. State Board of Adjustment*, 1937, 234 Ala. 372, 175 So. 383, 386; *State Tax Commission v. Commercial Realty Co.*, 1938, 236 Ala. 358, 182 So. 31, 35.

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466. A waiver of sovereign immunity must be made by the "most express language, or by such overwhelming implication from the text as would leave no room for any other reasonable construction." *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 53 L. Ed. 742, 751. Here, the Constitution of the State of Alabama prohibits a waiver. Neither the officials nor the citizens of the State of Alabama were placed on notice, that by engaging in interstate commerce by rail, the State would thereby become amenable to suit by its citizens. Cf. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292, 306-7, 81 L. Ed. 1093, 1102-3. The State of Alabama has never intentionally abandoned its immunity from suit; indeed, it has specifically invoked its immunity. *State Docks Commission v. Barnes*, 225 Ala. 403, 143 So. 581;

*Kansas City Bridge Co. v. Alabama State Bridge Corporation*, 1932, 5 Cir., 59 F.2d 49, cert. deni. 287 U.S. 644, 77 L. Ed. 557.

*Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L. Ed. 2d 804, relied upon by Parden is inapposite. In *Petty* a divided court, six to three, held that since the question of waiver arose from an interstate compact, the Court was not called on to interpret unilateral state action, "but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with Congressional approval," was a question of federal law. The compact in *Petty* specifically provided that the authority had the power "to sue and be sued in its own name". Three of the majority, Mr. Justice Black, Mr. Justice Clark and Mr. Justice Stewart concurred in the result without reaching the constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more states under state compacts. Tennessee and Missouri drafted their compact, accepted it after Congressional approval, knew the terms of the compact, the approving legislation and knew its interpretation was a matter of federal law. The State of Alabama had no reason to expect that it would be charged with waiving its constitutional immunity from suit when it began operations as a common carrier by rail in 1927. (R. 21.)

Moreover, the fact that the State of Alabama has adopted a workmen's compensation law for its employees, including Parden, Code of Alabama 1940 (Re-



compiled 1958) Title 55 §§ 333-4, Appendices II and III; Opinion of the Attorney General of the State of Alabama, Appendix IV; *State Board of Adjustment v. Lacks*, 247 Ala. 72, 22 So. 2d 377, is presumptive that the State did not intend to waive its immunity from suit. *Johansen v. United States*, 343 U.S. 427, 440, 96 L. Ed. 1051, 1060.

Reason and authority compel the conclusion that the sovereign State of Alabama has not knowingly or by implication waived its sovereign immunity from suit.

### CONCLUSION.

The judgment of the United States Court of Appeals for the Fifth Circuit rendered January 3, 1968 (R. 103-4) should be affirmed.

Respectfully submitted,

**RICHMOND M. FLOWERS,**

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**CERTIFICATE AS TO SERVICE.**

I, Willis C. Darby, Jr., hereby certify that I have mailed a copy of the foregoing Brief properly addressed to Honorable Al G. Rives and Honorable Timothy M. Conway, Jr., counsel of record for Petitioners, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the 28. day of January, 1964.

**WILLIS C. DARBY, JR.**



## APPENDIX I.

[fol. 115]

Corrected

In United States Court of Appeals  
For the Fifth Circuit

No. 19519

R. B. Parden, et al., Appellants,

versus

Terminal Railway of the Alabama State  
Docks Department, et al., Appellees.

Appeal from the United States District Court for the  
Southern District of Alabama

Opinion—January 3, 1963

Before RIVES, CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: This appeal involves the question whether the State of Alabama may be sued by its citizen in a District Court of the United States on a claim based upon the Federal Employers Liability Act<sup>1</sup> for damages [fol. 116] for personal injuries

<sup>1</sup> Title 45 U.S.C.A. § 51:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or any insufficiency, due to its negligence, in its cars, engines, appliances, machinery . . . or other equipment."

Concurrent jurisdiction of actions under the statute is conferred by 45 U.S.C.A. § 56 in state and federal courts.

sustained by its citizen while employed by a railroad belonging to the State of Alabama which was operated as a common carrier in interstate commerce and while he was so engaged. The action<sup>2</sup> was brought against Terminal Railway, Alabama State Docks; and the Sovereign State of Alabama, entering its appearance specially, moved to quash the return of summons on it or to dismiss the action, on the grounds that the Terminal Railway was an agency of the State, that the State had not consented to be sued or waived its immunity, and that the judicial power of the United States did not extend to this controversy because it is between a citizen of Alabama and the State of Alabama. Both motions were heard on the face of the pleadings supplemented by four affidavits and two depositions and were [fol. 117] granted by the court below in an order stating:

"It is Ordered by the Court that the motion of the Sovereign State of Alabama to quash return

<sup>2</sup> Besides the action brought by R. B. Parden for personal injuries sustained July 13, 1938, four other actions were brought which involve the same jurisdictional facts as Parden's claim, varying only in the details of the facts as to liability and the injuries received. These four are: a second action filed by Parden for personal injuries sustained June 3, 1938; action by Otto Driakell alleging two injuries received by him on July 22, 1938; action by Mrs. Elizabeth W. Wiggins and Frank E. Burge, Jr., Administrators of the estate of John Irvine Wiggins, deceased, based on claims for two injuries received by him November 15, 1938 contributing to his death; and action by Aubrey E. Price claiming two separate personal injuries occurring Oct. 2, 1939, one based upon the Federal Employers Liability Act and the second upon the Federal Safety Appliance Act, 45 U.S.C.A. § 2. The several actions were consolidated for trial in the court below and for purposes of this appeal.

The first action of R. B. Parden will be discussed in most instances, but everything herein said will have reference also to the other four civil actions.

of service of summons be, and the same hereby is, Granted, and

"It is Further Ordered by the Court that the motion of the Sovereign State of Alabama to dismiss the action be, and the same hereby is, Granted, with costs herein taxed against the Plaintiff."

The parties do not contend on appeal that there is any dispute about the facts, but agree that the case presents only questions of law. The basic facts are here set forth and others will be adverted to in our discussion of the several arguments:

The Terminal Railway was and is wholly owned and operated by the State of Alabama, consists of about fifty miles of railroad tracks in the area adjacent to the Alabama State Docks at Mobile, Alabama, serving in addition several industries situated in the general vicinity, and operating an interchange railroad with Alabama, Tennessee and Northern Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, and Gulf, Mobile and Ohio Railroad Company. A large percent of its operations are in interstate commerce; and it has contracts and working agreements with the various railroad brotherhoods, and makes reports to the Interstate Commerce [fol. 118] Commission concerning injuries sustained by its employees, and keeps its accounts so as to comply with the regulations of the Interstate Commerce Commission.

Appellant Parden argues that the owner of every common carrier by railroad engaging in interstate



commerce is liable for injuries to its employees so engaged under the clear and all-embracing language of the F.E.L.A. quoted in footnote 1, *supra*,<sup>3</sup> that the State of Alabama is so liable because it operates this railroad under constitutional amendment<sup>4</sup> and statute;<sup>5</sup> and that, under the Commerce Clause of The United States Constitution and three Supreme Court cases hereinafter considered, it is subject to and liable under F.E.L.A. and the Safety Appliance Act to the same extent as an individual.

Alabama counters with the contention that the whole sum of the judicial power granted by the Constitution to the central government does not embrace any authority in its courts to entertain a suit brought by a citizen against his own State; and that the State of Alabama has not waived its immunity from suit. The appellant responds by asserting that the general principles relied upon by the State do not apply where the State is deemed to have consented to suit; and that, since Alabama is not protected by the Eleventh Amendment to the Constitution, it is deemed to have consented by the mere fact that it entered [fol. 119] into and conducted the operation of an interstate railroad under the statutory and organic law of the State.<sup>6</sup>

<sup>3</sup> And under the Federal Safety Appliance Act, Title 45, U.S.C.A. § 2, as to one of the civil actions now before us.

<sup>4</sup> Alabama Constitution 1901, Amendments 12 and 116.

<sup>5</sup> 1940 Code of Alabama (Recompiled, 1958) Title 38, §§ 17 and 45 (14, 16).

<sup>6</sup> Appellant's position is well epitomized in the following excerpts from its reply brief:

"None of the authorities cited under this subdivision of the opposing argument hold that the judicial power of the United States does not embrace the authority to entertain a suit brought by a citizen against his own state, where the State

We do not agree that the State of Alabama, by the mere fact that it legally operated an interstate carrier, surrendered its right not to be sued, which belongs to the Union and all the States in it, except as explicitly provided otherwise in the Constitution. It is conceded that Alabama could not be sued by a citizen of another State seeking to assert the identical right claimed here. This, the appellant conceives to be a protection vouchsafed by the Eleventh Amendment which it says, Alabama does not possess when it is sued by its own citizen. We think this attitude arises from a misunderstanding of the effect of the Eleventh Amendment and of the status of the States of the Union independent of it. This is made clear by a brief consideration of the history of the Amendment as developed in decisions of the Supreme Court.

[fol. 120] Almost before the ink had dried on the signatures to the Constitution, a citizen of South Carolina filed suit against the State of Georgia in the Supreme Court of the United States asserting jurisdiction under Article III, Section 2, Clause 1 of the Con-

has consented to such suit.

"We urge that it is a sound construction of the Federal Employers Liability Act, when considered in the light of Supreme Court decisions concerning the Safety Appliance Acts and the Railway Labor Act, that Congress has prohibited any entity, state or private, from engaging in business as an interstate common carrier railroad, without consenting to be sued in a United States District Court under the Federal Employers Liability Act.

"As we see it, if the Constitution of the State of Alabama authorizes the operation of this railroad, then it is subject to all the provisions of the Federal Employers Liability Act. Liability under the Act can be avoided only if the State is acting unconstitutionally by operating the Terminal Railway of Alabama State Docks."

stitution.<sup>7</sup> The Supreme Court<sup>8</sup> upheld the claimed right in a decision whose essence the syllabus sums up in these words: "A State may be sued, in the Supreme Court, by an individual citizen of another State . . . ."

The people, who had just adopted a Constitution which delegated certain powers to the central government, did not agree with this construction of what they had written; and they promptly adopted the Eleventh Amendment: "The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." [Emphasis supplied.]

The Amendment dealt solely with the prepositional phrases—"between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects"—being cast in the precise words of those phrases. And it dealt with the construction of those phrases only, stating without equivocation that the grant of power was not to be construed as authorizing a citizen or subject to sue another State. It directed simply that no court considering that phrase should have the power to construe [fol. 121] it other than as directed by the Eleventh Amendment. The Amendment did not add anything to the Constitution.

<sup>7</sup> "The judicial Power shall extend . . . to controversies . . . between a State and Citizens of another State; . . . and between a State . . . and foreign States, Citizens or Subjects." [Emphasis added.]

<sup>8</sup> *Chisolm, Executor v. Georgia*, 1793, 2 U.S. 419.

and did not take anything from it. It simply gave directions as to the meaning of a phrase already in the Constitution. It was definitely a limitation on the right of any court to construe that language of the Constitution in such a way as to diminish the immunity from suit which is an essential and universal attribute of sovereignty.

It was not necessary that the Amendment negate the right of a citizen to sue his own State because Article III of the Constitution, which alone deals with the federal Judiciary and defines the judicial power being delegated to the central government, nowhere mentions or hints at a case or controversy between a State and its own citizens as being justiciable by any court. As against its own citizens, therefore, a State did not need and has never needed the shelter or protection of the Eleventh Amendment.

It was almost a century after *Chisolm v. Georgia* and the Eleventh Amendment before the Supreme Court was faced with a suit brought by a citizen against his own State, *Hans v. Louisiana*, 1890, 134 U. S. 1. Jurisdiction in the Circuit Court was claimed under Article III of the Constitution, which declares that "The Judicial Power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made . . .," and the Act of March 3, 1875, 18 Stat. 470, c. 137, §1, now 28 U.S.C.A. §1331 (a), vesting in the Circuit Courts jurisdiction "of all suits of a civil nature at common law or in equity, arising under the

Constitution or laws of the United States, or treaties [fol. 122] made . . .” The lower court dismissed the suit and the Supreme Court affirmed without a dissent.

The opinion analyzes thoroughly the decision in *Chisolm v. Georgia*, the Eleventh Amendment, and the debates among the writers of the Constitution, and, in addition, those between Mason and Patrick Henry on one side and Madison and Marshall on the other, in the Virginia Convention. It quotes from Madison: “Its jurisdiction [the Federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court”; and from Marshall: “With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the Federal Court . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . .” And it characterizes the contention that the passage of the Eleventh Amendment had the effect of leaving a State open to suit by its own citizens in cases arising under the Constitution or laws of the United States as “. . . supposition . . . almost an absurdity on its face.” [Pp. 14 and 15.]



After quoting from a statement by Chief Justice Taney in *Beers et al. v. Arkansas*, 20 Howard 527, 529: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, [fol. 123] or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued . . ."; the opinion states its conclusion thus:

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence . . ."

This decision in *Hans v. Louisiana* has been cited as authority by the Supreme Court in approximately thirty cases.\*

This line of cases constitutes a continuing affirmation by the Court of the basic principle that the federal judicial system is one of enumerated powers, not of

\*E.g., *Ford Motor Co. v. Dept. of Treas. of Indiana*, 323 U.S. 459, 464; *Great Northern Ins. Co. v. Read, Ins. Comm.*, 1944, 322 U.S. 47, 51; *Monaco v. Mississippi*, 1934, 292 U. S. 313, 322; *Williams v. United States*, 1933, 289 U.S. 553, 575; *Ex parte State of New York*, 1921, 256 U. S. 490, 497; *Duhne v. New Jersey*, 1920, 251 U. S. 311, 313; *Palmer v. Ohio*, 1918, 248 U.S. 32, 34; *Ex parte Young*, 1908, 209 U.S. 123, 150.

enumerated limitations upon power. The lack of power in the court below, therefore, to entertain a suit by the individual against the State is not dependent upon the negative language of the Eleventh Amendment, which merely points out that such power is not given, but on the basic fact that such power is not lodged in the federal judiciary under our constitutional system.

[fol. 124] It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State.

The *Ford Motor Company* case, *supra*, stands for the well settled rule that waiver by a State of its sovereign immunity must be clearly shown, and that whether such a waiver has been established presents a question to be decided under State law (pp. 466-470). And *cf. Louisiana Land and Exploration Co. v. State Mineral Board*, 5 Cir., 1956, 229 F.2d 5, certiorari denied, 351 U. S. 975.

The Supreme Court of Alabama considered the provisions of the Alabama Constitution and statutes involved in the case before us in *State Docks Commission v. Barnes*, 1932, 143 So. 581. It was there decided that a claim for the death of one of the employees of of the State Docks Commission was a claim against the State, which was "performing a business or cor-

porate power and not a governmental function." Continuing, the court said (page 582):

"But Section 14 of the Bill of Rights of the Alabama Constitution provides that the State shall never be made a defendant in any court of law or equity. The State cannot consent to such a suit. This means not only that the State itself may not be sued, but that this cannot be indirectly accomplished by suing its officers or agents in their official capacity, when a [fol. 125] result favorable to plaintiff would be directly to affect the financial status of the State treasury . . ."

"The right to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers v. Arkansas*, 20 Howard 527; *Railroad Company v. Tennessee*, 101 U. S. 337; *Hans v. Louisiana*, 134 U. S. 1." So says the Supreme Court in *Palmer et al. v. State of Ohio*, 1918, 248 U. S. 32. And it is not contended that Alabama has given its express consent, but, on the contrary, its Supreme Court has held that it cannot so consent.

It is pertinent to mention that the State of Alabama has provided payment for injury to or death of any employee of the agency here involved "where in law, justice or good morals the same should be paid;" and that the remedy so provided is characterized by the Supreme Court as "a workmen's compensation law for State employees," *State Board of Adjustment v. Lacks*, 1945, 22 So. 2d 377; and cf. *Hawkins v. State Board of Adjustment*, S. Ct. Ala., 1942, 7 So. 2d 775.

It remains but to consider the three Supreme Court cases upon which appellant bases his chief reliance. The appellant frankly points out that none of the cases are applicable on their facts, but contends that some of the language found in the opinions warrants the assumption that, by operation of law, Alabama necessarily waived its immunity from suit by electing to operate a common carrier engaged in interstate commerce. The language of each of the cases is, of course, limited to the facts with which the Court was dealing.

[fol. 126] In *United States v. California*, 1936, 297 U. S. 175, it was claimed that § 6 of the Safety Appliance Act vested jurisdiction in the district court to entertain the suit by the United States for a statutory penalty imposed for violation of the Act. The application of the decision of the Supreme Court in that case, insofar as it has possible relation to the question before us, is thus pinpointed at page 187:

"Article III, § 2 of the Constitution extends the judicial power of the United States and the original jurisdiction of the Supreme Court to cases 'in which a State shall be a party.' . . . But Congress may confer on inferior courts concurrent original jurisdiction of such suits. . . . Section 233 of the Judicial Code, 28 U.S.C., 341 . . . gives to this Court 'exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens or between a State and citizens of other States or aliens.'"

The Court then goes on to decide that the later enacted § 6 of the Safety Appliance Act provides that the penalty which it imposes supersedes, for practical reasons, the provisions of the Judicial Code and, therefore, vests in the district court jurisdiction to recover the penalty against the State. The power to maintain the suit against the State is specifically vested by the Constitution in the United States. The case does not hint that an individual in whom the Constitution does not vest such a power could maintain such a suit against a State.

The action in *California v. Taylor, et al.*, 1957, 353 U. S. 553, was brought by five employees of the State Belt Railroad [fol. 127] operated by the Board of State Harbor Commissioners of California against the ten members of the National Railroad Adjustment Board, First Division, and its Executive Secretary. The United States, answering on behalf of the Board, supported the charges in the complaint that the Belt Road was governed by the Railway Labor Act of 1926 rather than by the Civil Service Laws of the State of California. The State of California intervened as a party defendant and opposed the claim of the employees of the Belt Railroad in which they sought to invoke the machinery of the Railway Labor Act. The Supreme Court held that the operation of the Belt Railroad was covered by the Railway Labor Act, and referred to the fact that several State courts, including an intermediate appellate court of California,<sup>10</sup> had held state owned belt railroads such as the ones here involved

<sup>10</sup> *Maurice v. State*, Dist. Ct. App., Cal., 1941, 110 P.2d 706.



subject to the Federal Employers Liability Act. Following its decision in *United States v. California*, *supra*, the Supreme Court held that Congress had the right to regulate the California Belt Railroad's employment relationships. In Note 16, page 568, however, the Supreme Court stated:

"The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Labor Relations Board in a suit against the State in a United States District Court under §3, First (p) of the Act is not before us under the facts of this case."

This statement by the Supreme Court disposes of the contention [fol. 128] of the appellants that this case is authority for the contention that Alabama had waived its immunity from suit.

*Petty v. Tennessee-Missouri Bridge Commission*, 1959, 359 U. S. 275, involved the question whether Tennessee and Missouri had waived their immunity to be sued when those States entered into a compact, with Congressional approval, for the construction of a bridge over the Mississippi River. To build and manage the bridge, there was created the Tennessee-Missouri Bridge Commission, a "body corporate and politic," wherein it was provided that the Commission had the power "to contract, to sue and be sued in its own name." The Court, after noting that "The conclusion that there has been a waiver of immunity will

not be lightly inferred, *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 171," decided that, under the facts of that case and "where the waiver is, as here, claimed to arise from a compact between several States," the Commission was suable under the sue-and-be-sued clause interpreted in the light of the conditions attached by Congress in approving the bridge over the navigable stream.<sup>11</sup> We think that the case is not authority for the waiver claimed here, and refer to the language used by this Court in *McDermott* [fol. 129] & *Co. v. Department of Highways, State of Louisiana*.<sup>12</sup>

Based upon the authorities cited and the foregoing reasons, we hold that the State of Alabama is constitutionally immune from suit under the facts before us and that there has been no waiver of this immunity.

<sup>11</sup> In a footnote, Mr. Justice Frankfurter, dissenting (page 289), stated the following:

"Suit in *United States v. California*, 297 U.S. 175, was instituted by the United States, and jurisdiction over such an action is not within the proscription of the Eleventh Amendment. In *California v. Taylor*, 353 U. S. 553, the State intervened in an action brought against the National Railroad Adjustment Board, hence voluntarily submitted itself to the jurisdiction of the federal courts."

<sup>12</sup> 5 Cir., 1959, 267 F. 2d 317, 318.

"Appellee, in its turn, citing, as settling the law to the contrary of this contention, other cases and *Petty v. Tenn.-Mo. Bridge Comm.*, 8 Cir., 254 F. 2d 857, reversed (three judges dissenting) in *Petty v. Tenn.-Mo. Bridge Comm.*, 358 U.S. 811 . . . not in principle but on the sole ground that the Act of Congress approving the interstate compact had made provision for the suit there brought, urges upon us that the judgment must be affirmed.

"This Court in a case involving a collision with a bridge in Broward County, Florida [*Broward County, Florida v. Wickman*, 5 Cir., 195 F. 2d 614], has settled it for this Circuit, as the Supreme Court in *Ex parte, State of New York*, 356 U. S. 490, . . . has for the country as a whole, that 'the immunity of a State from a suit in personam in the admiralty brought by a private person without its consent is clear.'"

The judgments entered in the captioned case and the others consolidated with it by order of the court below are

**AFFIRMED.**

**BROWN, Circuit Judge, concurring specially:**

I concur in the result and in much of the Court's opinion.

But in at least two places the Court states that "the State of Alabama is constitutionally immune from suit." — F. [fol. 130] 2d —.<sup>1</sup> Apart from the Eleventh Amendment, I find nothing in the Constitution nor in the elaborate structure of the opinion in *Hans v. Louisiana*, 1890, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842, to support that conclusion as a matter of federal constitutional law. Sovereign immunity, threadbare as it generally is, is recognized in law. It may, as it does here, deny effectual enforcement to a clear legal right. But that does not raise this notion to the stature of a federal constitutional right.

Moreover, I think the constitutional crisis generated by *Chisholm v. Georgia*, 1792, 2 U. S. 2 Dall 419, 1 L. Ed. 440, refutes this Court's thesis that when it was all said and done the Eleventh Amendment "• • • did not add anything to the Constitution and did not take anything from it." — F. 2d —. And to the extent

<sup>1</sup> See also: "It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State." — F. 2d —.

that *Hans v. Louisiana* really puts the result on the basis of the traditional immunity of a State, rather than on the obvious implications of the Eleventh Amendment, it seems clear to me that the Supreme Court did not undertake to cast it,<sup>2</sup> as does [fol. 131] this Court, in terms of a Constitution of enumerated powers and the "basic fact that such power is not lodged in the federal judiciary under our constitutional system." — F. 2d —. This latter would, among other things, mean that jurisdiction would be conferred by consent (of the sovereign waiving its immunity). This certainly contradicts a basic concept of a limited federal jurisdiction.

What the case presents is the anomaly of a clear legal right without any means of effectual enforcement. Without a doubt, Alabama and its operating agencies, the Terminal Railway and Docks Department are subject to the FELA. It is even likely that its scheme of vicarious workmen's compensation constitutes an outright violation of the Act which prohibits any contract, rule, regulation or device to enable a

<sup>2</sup> The strongest statement in *Hans* in this direction is: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U. S. 1, 15.

The Court speaks again in terms of suits unknown to or forbidden by law in *Fitts v. McGhee*, 1899, 172 U. S. 516, 524, 19 S.Ct. 269, 43 L.Ed. 535.

"Is this a suit against the state of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a state by citizens of such state. But it has been adjudged by this court upon full consideration that a suit against a state by one of its own citizens, the state not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a state by citizens of another

common carrier to exempt itself from the liabilities imposed.<sup>3</sup>

But clear as is the legal right, invalid as is the substitute compensation program, neither in the FELA nor in the Alabama statutes prescribing the physical operation of this [fol. 132] interstate carrier is there enough material out of which to extract even the faintest notion of a waiver of that traditional immunity which Alabama painstakingly has additionally preserved by its own express constitutional provision.

The suit therefore must fall. But we should not by our discussion couched in language of a constitutional immunity apart from the Eleventh Amendment foreclose remedial action by Congress or, perhaps, judicial relief in its own courts at the hands of agencies of the United States Government whose statutory policy may not be thwarted by this plea.

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state of the Union, or by citizens or subjects of foreign states. *Hans v. Louisiana*, 134 U.S. 1, 10, 15 [33:842, 845, 847]; *North Carolina v. Temple*, 134 U.S. 22 [33:849]. It is therefore an immaterial circumstance in the present case that the plaintiffs do not appear to be citizens of another state than Alabama, and may be citizens of that state."

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<sup>3</sup> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void \* \* \*." 45 USCA § 55.



[fol. 133]

**APPENDIX II.****CODE OF ALABAMA 1940 (RECOMPILED 1958)  
TITLE 55, SECTION 333.**

**Composition of board.**—There shall be a board of adjustment to be composed of the director of finance, the treasurer, the secretary of state and state auditor. The chairman of said board shall be selected by the board from its members. The secretary of state shall also be the secretary of said board, and shall perform all the duties, powers, and functions required of the secretary by the board. The attorney general shall attend the meeting of the board and represent the state of Alabama in all proceedings before the board. The board of adjustment shall be furnished with necessary quarters, stationery and postage, in the same manner as the same are furnished to other state officers, agencies, commissions, boards, institutions, or departments. Any three of said board members shall constitute a quorum to transact business and discharge the functions of said board; provided, however, that in case there is an equal division of opinion on any decision or claim that the board is authorized to hear, the chairman of the board shall determine the decision in such instance. The board of adjustment shall have the power, if in their opinion the situation warrants it, to visit any scene of any injury or accident and make a view thereof, and take said facts in consideration and personally interview such persons as may have knowledge or information as to

the subject matter of the claim under consideration by said board, and may take such views and information into consideration in reaching their conclusion and making awards on claims. The board of adjustment shall supervise and direct the secretary of the board as to making a record, as provided in section 341 of this title, and shall aid and direct said secretary in making up a report of all cases heard and determined by said board, stating the substance of the claim and the disposition made of the case, and shall cause said cases to be classified under said board's direction in accordance with the types and kinds of cases coming before said board. For the additional duties imposed upon the state auditor by this section, he shall be allowed and paid out of the treasury of the state of Alabama, as the salaries of public officers of the state of Alabama are paid the sum of \$600.00 per year, payable in monthly installments of \$50.00 each month from and after the effective date of this section. (1935, p. 1164; 1939, p. 602; 1943, p. 386, appvd. July 7, 1943.)

**APPENDIX III.****CODE OF ALABAMA 1940 (RECOMPILED 1958)  
TITLE 55, SECTION 334.**

**Powers and jurisdiction of the board.**—The board of adjustment shall have the power and jurisdiction and it shall be its duty to hear and consider all claims for damages to the person or property growing out of any injury done to either the person or property by the state of Alabama or any of its agencies, commissions, boards, institutions or departments; also, all claims for personal injuries or death of any employee of the state of Alabama, or any of its agencies, commissions, boards, institutions or departments arising out of the course of his employment, or sustained while engaged in the business of the state of Alabama or any of its agencies, commissions, boards, institutions or departments; also, all claims for personal injuries or death of any convict; also, all claims of members of the public at large or of officers of the law arising out of injuries sustained while attempting to recapture escaped convicts, which convicts have escaped after they have been placed in the actual custody of the department of corrections and institutions; also, all claims against the state of Alabama or any of its agencies, commissions, boards, institutions or departments arising out of any contract, express or implied, to which the state of Alabama, or any of its agencies, commissions, boards, institutions or departments are parties, where there is claimed a legal or moral obligation resting on the state; also, all claims for money overpaid on

obligations to the state of Alabama, or any of its agencies, commissions, boards, institutions or departments; also, all claims for money voluntarily paid to the state of Alabama, or any of its agencies, commissions, boards, institutions or departments, where no legal liability existed to make such payment; also, all claims for underpayment by the state of Alabama, or any of its agencies, commissions, boards, institutions or departments, to parties having dealings with the state of Alabama, or any of its agencies, commissions, boards, institutions or departments; also, all claims for money or property alleged to have wrongfully escheated to the state of Alabama. Also, all claims for injury or death of any student duly enrolled in any of the public schools of this state resulting from an accident sustained while being transported to or from school or in connection with any school activity in any bus or any motor vehicle operated directly by any school board or agency of the state or through contract with another. Awards payable to any such student for injuries sustained in such accident shall be equal to the maximum benefits payable to employees as provided in chapter 5 of the Title 26, Code of Alabama, for injuries, loss of time or medical attendance and where death results from such injuries the amount payable to the parent or parents of such student shall be equal to the maximum amount payable to totally dependent parent or parents as provided by chapter 5, Title 26, Code of Alabama; provided, however, that no payment for death of such student shall be made to any parent or parents unless they were actually supporting such student at the time of the accident causing the injuries

and death. The fact that such student has no earning capacity or earns an average wage of less than the amount which would entitle him to maximum benefits under chapter 5, Title 26, Code of Alabama, shall in no way limit an award to him, his parent or parents. Awards for such injuries or death shall constitute a prior and preferred claim against monies appropriated for the minimum program fund and no part of any such award shall be charged against any funds allotted to the school board of the county or city where said accident occurred. If it should appear to the board of adjustment after investigation that the accident causing the injury or death of such student was caused under circumstances also creating a legal liability for damages on the part of any party and it should further appear to the board of adjustment that claim may be made against such party by such student, his parent or legal representative, to recover damages, then, in that event, any payment otherwise due under this section may be withheld by the board of adjustment pending final settlement of such claim and, if said student or his parent or legal representative recover damages against said party, any sum so recovered and collected may be offset against payments due hereunder, and the balance due, if any, shall thereafter be promptly paid by the board of adjustment. The jurisdiction of the board of adjustment is specifically limited to the consideration of the claims hereinabove enumerated, and no others. Provided that nothing contained in this article shall confer upon the board of adjustment any jurisdiction now conferred by law upon the state board of compromise, and nothing con-



tained in this article shall be construed to confer jurisdiction upon the board of adjustment to settle or adjust any matter or claim of which the courts of this state have, or had, jurisdiction. Provided further that the board of adjustment shall have no jurisdiction over claims growing out of forfeitures or of contracts with any state agency, commission, board, institution or department, where, by law or contract, said state agency, commission, board, institution or department is made the final arbiter of any disagreement growing out of forfeitures or of contracts of said state agency, commission, board, institution or department, and, particularly, the board of adjustment shall have no jurisdiction of disagreements arising out of contracts entered into by the highway department. Employees of municipalities, counties, and governmental relief agencies are not to be considered employees of the state of Alabama or of any of its agencies, commissions, boards, institutions or departments, within the jurisdiction of this board, and within the meaning of the word "employee" as used herein. The provisions of this section shall apply to all claims relating to injuries to school children now pending before the board of adjustment or which may be filed with said board within one year of the date of an accident. Minor students shall have, for the purpose of this section, the same power to contract, make elections of remedy, make settlements and receive compensation as adults would have subject to the power of the board of adjustment in its discretion at any time to require the appointment of a guardian to receive monies or awards and payments of awards made to

such minor students or their guardian shall exclude any further compensation either to the minor students or to their parents for loss of service or otherwise. (1935, p. 1164; 1936-37, Ex. Sess., p. 205; 1953, p. 755, appvd. Sept. 9, 1953.)

**APPENDIX IV.****OPINION OF THE ATTORNEY GENERAL  
STATE OF ALABAMA**

Jan.-March, 1940 p. 286.

February 29, 1940.

Hon. C. E. Sauls, Director,  
Alabama State Docks and Terminals,  
Mobile, Alabama.

State Board of Adjustment—Department of State  
Docks and Terminals—

1. Claims awarded by same are payable from the fund designated by the Board, in the same manner as other charges against the fund are payable.

2. Copy of decree to be paid out of the fund of the Department of State Docks and Terminals should be sent to the Director of the Department of State Docks and Terminals.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 1, 1940, in which you request my opinion as follows:

"On January 18th the State Board of Adjustment awarded J. E. Molamphy the sum of \$2,800.00 for

damages done by fire to certain property of his at the State Docks and ordered that a copy of the decree be furnished the Comptroller and that the Comptroller draw his warrant payable to Mr. Molamphy and charge the award against the funds of the State Docks Commission.'

"As I understand it, there has been no specific appropriation by the State to the State Docks out of which this award can be paid. I desire to pay the amount awarded Mr. Molamphy, provided I will incur no risk in so doing.

"Will you kindly advise me whether I am authorized to draw this Department's check to the State Comptroller to reimburse him for the money he is ordered by the Board to pay to Mr. Molamphy, and oblige."

Permit us to preface our comments by setting out in extenso the sections of the act creating the State Board of Adjustment which are pertinent to your inquiry. Act No. 546, H. 871, approved September 14, 1935 (General Acts, 1935, p. 1164) reads in pertinent part as follows:

"Section 3. The State Board of Adjustment in its findings of facts and its findings and decrees as to the amount of payment may also find the agency or agencies of the State of Alabama which inflicted the injury or damage complained of, if the Board finds there is injury or damage done to persons or property, and may adjudge and find that said damage shall be made out of the appropriation made to the agency or department of the

State of Alabama, whose employees, servants, agents or instrumentalities inflicting the damages and injuries complained of. *Provided, however, that said Board may order the payment of any claim out of any fund or funds herein appropriated.*" (Emphasis supplied.)

"Section 4. The Secretary of the State Board of Adjustment shall make a record of and file in the office of the Secretary of State a history of the case, together with the findings and decrees of the State Board of Adjustment and shall deliver to the Comptroller of the State of Alabama a certified copy of the same, and upon receipt of such a copy of the findings of the State Board of Adjustment with the Comptroller, the Comptroller of the State of Alabama is authorized and directed to draw his warrant in favor of the person or persons, association or corporation, found by said State Board of Adjustment to be entitled to the damages in the amount of the damages so certified and shall *charge the same to the appropriations as directed*

"Section 10. There is hereby appropriated out of the general fund of the State of Alabama and the State Insurance Fund, the Confederate Pensions) the Convict Fund or the highway fund, or any other fund of the State, to be determined by such Board, a sufficient amount, not exceeding \$200,000.00 for the next fiscal year and not exceeding \$50,000.00 for any subsequent year, as may be necessary to pay the claims ordered by the Board." (Emphasis supplied.)

This act has been twice amended, but in respects not here material.



Therefore, it appears that the act creating the Board gave to it the authority to require the payment of awards made by it out of any fund of the State that it designated. Section 10 makes an appropriation from every fund of the State in such an amount as it necessary to pay awards ordered to be paid from such funds, subject, of course, to the limitations contained in said section. Section 4 requires the Comptroller to issue a warrant in payment of any award made under the direction of the Board and charge same to the appropriation as directed. As we have pointed out, the appropriation is provided by Section 10.

Although Section 4, *supra*, states that a certified copy of the decree of the Board be sent to the Comptroller, it is undoubtedly the legislative intent that the copy of the decree be sent to the officer who has charge of the disbursement of the fund from which the Board has directed the award to be paid. The reason for the Comptroller to have been specifically mentioned in Section 4 is obvious, since he is the disbursing officer for almost all State funds. It is my opinion that in an award to be paid from the Department of State Docks and Terminals, the copy of the decree would more properly be directed to the Director of that department.

Claims of this sort have been paid in the manner hereinabove set out from the fund of the State Docks Commission, the predecessor of the Department of State Docks and Terminals, in several cases. The records of the Board show that among these are W. E.

Horne, a claim paid out of the fund of the State Docks Commission on the order of the Board in the amount of \$300,000. Also, George Sossaman, Administrator of the estate of Leo Lambele, \$750.00; Evie D'Olive, \$500.00; Mary E. Barnes, \$1,500.00.

Our courts have held that the construction given a statute, the language of which is not clear; in the administration thereof over a period of years will lend weight toward that construction. *State v. Tuscaloosa Building & Loan Ass'n.*, 230 Ala. 476, 161 So. 530, 99 A.L.R. 1019; *Waters v. State*, 25 Ala. App. 144, 142 So. 113.

In reaching the above conclusion, the following well known rules of statutory construction also support the same:

The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute, and a particular rule for construing statutes must be regarded as subservient to the end of determining the legislative intent. See cases collated in 18 Alabama Digest 119, Statutes, Key No. 181(1).

A statute is to be construed so as to carry out the intent of the Legislature, though such construction may seem contrary to the letter of the statute, and a liberal interpretation which would defeat the purposes of the statute will not be adopted if any other reasonable construction can be given to it. See cases cited in 18 Alabama Digest 120, Statutes, Key No. 183.

Premises considered, it is my opinion that the copy of the decree referred to in your inquiry should be directed to you, as Director of the Department of State Docks and Terminals, instead of to the Comptroller, and that you should pay the same out of the fund of the Department of State Docks and Terminals.

This matter is being called to the attention of the Board, and upon their sending to you a copy of their decree, drawn in accordance with this opinion, it is my opinion that you should issue a warrant against the fund of your department in the amount so stipulated in the award.

Yours very truly,

THOMAS S. LAWSON,  
Attorney General.

FEB 19 1964

JOHN F. DAVIS, CLERK

**IN THE  
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1963:

**No. 157**

**R. B. PARDEN ET AL.,**

*Petitioners,*

*vs.*

**TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT ET AL.**

**REPLY BRIEF OF PETITIONERS**

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**REPLY BRIEF OF PETITIONERS**

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**ARGUMENT**

In their reply, petitioners will follow the format of the brief submitted on behalf of respondents:

**A**

**(1)**

To the point that the congressional record shows no affirmative intent to include state operated railroads within the FELA, suffice it to say that the subject was not expressly discussed one way or the other, and it appears that the intent was to cover all railroads, without excep-

tion. As was pointed out in *California v. Taylor*, 353 U.S. 553, 1 L. ed. 2d 1034, 77 S. Ct. 1037 (the Railway Labor Act case), when congress intended to exclude state employees from the effect of federal statutes, express exemptions were provided. Just as its failure to do likewise in the Railway Labor Act was held to indicate a purpose not to exclude state employees, the same failure here indicates a purpose not to exclude state operated railroad employees from rights under the FELA.

(2)

An effort is made in the opposing brief to gain comfort from the Federal Control Act of 1918, 40 Stat. 451. The purpose of this statute is apparent from a reading of its text, particularly section 10. It did not apply solely to FELA actions, nor was the FELA expressly mentioned therein. It applied to all actions at law or suits in equity, and in effect, placed the federal government in the shoes of the carriers it had seized. It even went so far as to provide that a state court suit, not otherwise removable to a federal court, could not be removed on the ground that the railroad was operated by the federal government, and authorized remanding of any pending actions already removed on that ground. The act did not recognize, as respondents contend, that in the absence of this statute, the federal government was not suable on account of its activities in the operation of such railroads. Its clear purpose was to eliminate doubts and confusion necessarily resulting from federal seizure.

Furthermore, it is submitted that there is no valid comparison between the possible venture of the federal government into the operation of a common carrier enterprise and like action by a state which has delegated to the congress the right to regulate such ventures. Never-

theless, no useful purpose is served by speculating on the result of a FELA suit against the United States if it were to organize its own railroad and thereby commence business as a common carrier. There is no precedent to which one may point, and the attempt to draw this analogy leads to a void, from which no authority provides an exit.

## (3)

Next, respondents suggest that Section 6 of the FELA was not designed to confer jurisdiction upon the federal courts to entertain these suits, citing prior use of the phrase "concurrent with that of the courts of the several states," and *Hans v. Louisiana*, 134 U.S. 1, 33 L. ed. 842. Again, an inept analogy is drawn because the cause of action asserted in *Hans* was based upon Louisiana's obligations under bonds it had issued. The cause of action asserted did not arise under any statute of the United States whereas the very basis of the suits at bar is a federally created cause of action.

## B.

## (1)

The *Hans*, *Duhne*, and *Fitts* cases, as well as others, are cited by respondents to support the point that a suit may not be brought against a state without its consent, and that general proposition is not disputed but is recognized by petitioners. The distinction between the cases at bar and those relied upon by respondents is that none of the latter involved an attempted enforcement of a federally granted right of action. The suits which were held not maintainable in federal courts as arising under the constitution or laws of the United States simply did not so arise, but involved assertions of non-federal rights, though in some cases, asserted constitutional rights became in-

directly involved. Traditionally, federal question jurisdiction is tested by the question of whether a federal law is an essential element of the plaintiff's case, and if a federal law is merely evidence to prove the validity of plaintiff's right of action or to disprove the validity of a defense, it is not "a case arising under the constitution or laws of the United States." *Gully v. First National Bank*, 299 U.S. 109, 81 L. ed. 70, 57 S. Ct. 96. If the federal law merely "lurks in the background" it is not a federal question case, *Gully v. First National Bank*, *supra*, and in cases cited on page 13 of the opposing brief, at best, that was where the federal question lay.

(2)

Opposing counsel have repeatedly referred to state immunity from suit as a constitutional right rather than a right inherent in sovereignty. Petitioners take the position that whether state immunity from suits to enforce other than federally granted rights is based upon the constitution or is inherent in sovereignty is really of no moment here, because regardless which it is, it is unquestioned that a sovereign can voluntarily subject itself to suits. The lack of a state statute or constitutional provision expressly authorizing these suits is not fatal to their maintenance. The sovereign states voluntarily vested in the congress the unfettered right to regulate interstate commerce, there being no reservation as to states venturing into an interstate commerce business. Efforts of congress to regulate interstate commerce under its exclusive prerogative could be substantially crippled if all states were to enter the railroad or trucking business and avoid the consequences of any regulation under the terms of which they might be brought to court.



(3)

Next, it is contended that congress may not condition the right of a state to engage in interstate commerce upon its relinquishment of immunity from suit. This point is sought to be supported by decisions to the effect that states may not condition the grant of a privilege upon the relinquishment of a constitutional right. It must be borne in mind that the rights involved in the authorities relied upon by respondents were constitutional rights guaranteed to individuals. Immunity from suit is an element of sovereignty, and certain elements of sovereignty were surrendered by all states which adopted the federal constitution. The California State Belt Railroad cases, although restricted in their holdings to the facts before the Court, leave no doubt that such sovereignty as the states may have had was totally surrendered insofar as ventures into interstate railroad businesses are concerned. This is not a congressional regulation of the performance by states of their governmental functions, but a regulation of private enterprise, in which the State of Alabama elected to engage in a proprietary capacity, and thus, the state has placed itself under a federal regulation equally applicable to all like proprietary businesses. The fact that the FELA does not specifically mention state owned railroads is of no aid to the State of Alabama (*United States v. California*, 297 U.S. 175, 185, 80 L. ed. 567, 573). If the states had intended to exempt themselves from the power of congress to require railroads to submit to suits as a part of congressional regulation of interstate commerce, such reservation should have been expressed in the constitution.

It is not a matter of this statute requiring a state to relinquish its immunity from suit, as it is a recognition that such immunity was relinquished by the states in the adoption of the constitution delegating to congress the right

to regulate interstate commerce, without reservation of the right of states to engage therein unfettered by federal regulations.

Finally, in *United States v. California, supra*, this Court pointed out that the Safety Appliance Act is remedial (so is the FELA) to protect employees from defective appliances (the FELA is to protect employees from defective appliances and negligence), and held that the persons intended to be protected by the act are afforded that protection as against state as well as privately owned carriers which bring themselves within the sweep of the all-embracing language of the statute. The conclusion that the FELA is equally applicable may be avoided by the State of Alabama only by saying that its delegation to congress of the right to regulate interstate commerce was conditional.

## C

### (1).

Respondents' reliance on the Alabama constitutional provision to the effect that the state shall never be made a defendant in any court of law or equity is paper-thin. This provision of the Alabama constitution is material only if, but for its existence, these causes of action could be maintained. Analyzing the proposition a little further, one comes to the question: Assuming Alabama's Terminal Railway to be subject to FELA suits in the federal courts, could the state, by adopting this phrase in its constitution, thereby exempt itself from liability under the FELA? An affirmative answer would indicate that a state can, by unilateral action, amend the Constitution of the United States by adding a proviso that the right of congress to regulate interstate commerce is limited. Thus, a negative answer to the question becomes obvious.

(2)

As its parting salvo, Alabama has inserted a misleading and inaccurate assertion that a Workmen's Compensation Law for the benefit of its employees, including petitioners, has been enacted and is available. We submit that the state legislature cannot destroy a federally created cause of action by providing for a substitute right and remedy, and this prohibition is expressly set forth in the FELA. 45 U.S.C., § 55. At best, the statutes quoted in Appendices II and III of the opposing brief might be an alternative remedy which petitioners could elect to follow if their claims could be held to fall under the provisions of those statutes. However, claims of the petitioners are excluded by the laws which govern the Alabama State Board of Adjustment. Counsel have cited Title 36, §§ 333 and 334, of the Alabama Code, which establish the State Board of Adjustment and set out its powers and jurisdiction. They failed to cite the statutes which show that petitioners would have no claim before the State Board of Adjustment.

Title 55, § 339, of the Alabama Code (Appendix I hereof) provides that the rules of Chapter 5 of Title 26 of the Alabama Code (the Workmen's Compensation Act of Alabama) as to liability are to be followed in claims for personal injury or death of state employees, and Title 55, § 336 (Appendix II hereof) limits the amounts to be awarded to the amount recoverable in a Workmen's Compensation case. Title 26, § 263, of the Alabama Code (Appendix III hereof) specifies that the Workmen's Compensation Act of Alabama shall not apply "to any common carrier doing an interstate business while engaged in interstate Commerce. . . ."

Again, we think the argument presented by the State of Alabama "cuts the other way." The fact that its stat-

utes which provide a source of compensation for some employees exclude coverage as to petitioners is indicative of an acknowledgment that the remedy of the petitioners lies elsewhere. Further acknowledgment of the applicability of the FELA is found in the book of operating rules governing Terminal Railway employees, where it is recognized that Terminal Railway may be involved in cases under the FELA. (R. 48; Pl. Ex. 4, R. 58)

### CONCLUSION

It appears particularly significant that Alabama does not contend that employees of its Terminal Railway are not under the Federal Employers' Liability Act, and it therefore must be assumed to be conceded that the act does apply. The sole contention is that the rights of petitioners under the act are totally unenforceable. It would be strange indeed if that portion of the act which makes the railroad liable to its employees applies, but that portion which provides for the enforcement of that liability does not. Yet, that is what Alabama asks this Court to hold.

It is not a question of congress stripping a state of its sovereignty, because a portion of that sovereignty had already been surrendered to congress. Nor is it a question of congress conditioning Alabama's right to operate this railroad upon a surrender of its sovereignty (or so-called constitutional immunity from suit), because in delegating congress authority to regulate interstate commerce, such portion of its sovereignty or immunity had already been relinquished. The logic of the opinions in the California State Belt Railroad cases lead directly to that conclusion,

and to the further result that the decisions of the courts below are due to be reversed.

Respectfully submitted,

-----  
AL. G. RIVES,

*Attorney for Petitioners.*

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RIVES, PETERSON, PETTUS & CONWAY,  
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Birmingham, Alabama,  
*Of Counsel for Petitioners.*

### CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing reply brief and argument of petitioners, postage prepaid and correctly addressed, to each of the following: Honorable Richmond M. Flowers, Attorney General of the State of Alabama, Montgomery, Alabama and Honorable Willis C. Darby, Jr., Attorney at Law, 307 First National Bank Building, Mobile, Alabama.

This the..... day of February, 1964.

-----  
AL. G. RIVES,

*Attorney for Petitioners.*



## **APPENDIX**

**APPENDIX I.****Title 55, Section 339****1940 CODE OF ALABAMA****(Recompiled, 1958)**

**"§ 339. Method of determining award.—When claims are properly prepared and presented to the board of adjustment, and after ascertaining the facts in the case, it is directed to determine the amount of the injury, death or disability or other injury or damage arising from contract or business, and to fix the damages, using as its guide, when applicable, the ordinary rules of negligence and workmen's compensation laid down by the courts and the moral obligation of the state of Alabama and to decree and find the person entitled to payment and the amount, if any, which should be paid and any other facts necessary for a proper adjustment of claims. The ordinary rules of negligence, as to liability, are to be followed in claims by parties not employees of the state of Alabama, or any of its agencies, commissions, boards, institutions or departments. The rules of chapter 5 of Title 26, as to liability, are to be followed in claims for personal injury or death of employees of the state of Alabama, or of any of its agencies, commissions, boards, institutions or departments, and also in claims for the injury or death of convicts. Claims for death shall be made by the personal representative, who shall distribute the proceeds of the claim in the same manner as is provided by law with respect to damages awarded for death by wrongful act. Whenever the provisions of this article authorize ascertainment of the amount of damages and provide for payment of the judgment, finding or award of the board of adjustment, they shall be construed to include also claims arising from**

contract or business dealings as well as for personal injury, property damage, death and disability. (1935, p. 1164; 1936-37, Ex. Sess., p. 205.)"

## **APPENDIX II.**

### **Title 55, Section 336**

#### **1940 CODE OF ALABAMA**

(Recompiled, 1958)

"§ 336. Limitation on amount of award for personal injury or death.—The board of adjustment shall not fix a greater amount to be paid on any claim for death or personal injuries than the limits fixed in chapter 5 of Title 26 for injuries, loss of time, medical attendance or death; provided that convicts shall be considered as receiving the minimum wages mentioned in chapter 5 of Title 26. (1935, p. 1164.)"

## **APPENDIX III.**

### **Title 26, Section 263**

#### **1940 CODE OF ALABAMA**

(Recompiled, 1958)

"§ 263. (7543) Articles 1 and 2 of chapter not applicable to certain employments.—Articles 1 and 2 of this chapter shall not be construed or held to apply to any common carrier doing an interstate business while engaged in interstate commerce, or to domestic servants, farm laborers, or persons whose employment at the time of the injury is casual, and not in the usual course of the trade, business, profession or occupation of the employer, or to any employer who regularly employs less than eight employees in any one business, or to any county, city, town, village or school dis-

trict. Any employer who regularly employs less than eight employees in any one business or any county, city, town, village or school district may accept the provisions of articles 1 and 2 of this chapter by filing written notice thereof with the department of industrial relations and with the probate judge of each county in which said employer is located or does business, said notice to be recorded by the judge of probate for which he shall receive the usual fee for recording conveyances, and copies thereof to be posted at the places of business of said employers and provided further, that said employers who have so elected to accept the provisions of articles 1 and 2 of this chapter may at any time withdraw the acceptance by giving like notice of withdrawal. In no event nor under any circumstances shall articles 1 and 2 of this chapter apply to farmers and their employees. (1939, p. 1036, § 2, appvd. July 10, 1940.)"

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**JUN 11 1964**

**JOHN F. DAVIS, CLERK**

**Supreme Court of the United States**

**OCTOBER TERM, 1963.**

**No. 157**

**R. B. PARDEN, ET AL.,**

**Petitioners,**

**versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL.,**

**Respondents.**

**PETITION FOR REHEARING AND BRIEF IN SUPPORT  
OF PETITION FOR REHEARING.**

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**SUPREME COURT OF THE UNITED STATES.**

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**versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE**  
**DOCKS DEPARTMENT, ET AL.,**  
**Respondents.**

---

**PETITION FOR REHEARING.**

---

*To the United States Supreme Court and the Justices  
thereof:*

The State of Alabama, the Respondent in the above  
entitled cause, presents this, its petition, for a rehearing  
of the above entitled cause, and, in support thereof,  
respectfully shows:

**I.**

The decision in this cause decides important consti-  
tutional questions affecting the relationship of each  
State to the federal government; the relationship of

the Legislature to the Judiciary; the means by which a known constitutional right may be waived; and the power of Congress to condition an act or a course of conduct involving commerce upon the forfeiture of a constitutional right. The commerce power of Congress vis-a-vis a State's constitutional immunity from suit clash head on for the first time.

Issues affecting the status of the States in our federal system have been decided by the vote of one member of this Court without affording but one State an opportunity to be heard.

Although this case falls within the spirit of 28 U.S.C. 2403 and within the letter of Supreme Court Rule 33(b), the Solicitor General was not given an opportunity to express the views of the United States. The Solicitor General may share the same views as the four Justices who dissent here and the four Judges who this Court now reverses.

Issues that affect the foundation of our federal system should not be resolved by one member of this Court on the basis of arguments presented by only one of the States.

The sharp division in this Court and the unanimity in the lower courts should cause this Court to afford the Attorneys General of the several States, the Solicitor General and others interested in preserving our federal system and constitutional rights an opportunity to be heard on the important issues presented in this cause.

Attorneys General of several States have expressed their dissatisfaction with the opinion of this Court and several have indicated an intention of filing an amicus brief in support of this petition; others are unable to prepare briefs because of limitations of time.

## II.

The majority fails to accommodate the power of Congress to regulate interstate commerce with a State's constitutional immunity from suit.

The power of Congress to regulate commerce and a State's immunity from suit may be accommodated if this Court will allow Congress to intelligently consider the problem.

No question of a State's immunity from suit at the hands of an individual need arise. Congress has made the accommodation in the past by providing for actions by the United States against interstate carriers to compel compliance with the congressional policy. Congress might require a State, as Alabama has voluntarily done, to provide insurance with a direct action against an insurance company to compensate employees for industrial accidents. A constitutional issue would not be presented in this cause if the majority had not inferred something that Congress never considered, that Congress intended to condition a State's engaging in commerce by rail upon the State waiving its constitutional immunity from suit.



Had Congress passed a bill directly conditioning a State's engaging in interstate commerce by rail upon the forfeiture of the State's constitutional immunity from suit by as narrow a margin as this Court decides issues here, the President would have had the final responsibility to determine whether the bill would become law.

The majority's refusal to accommodate the federal system, legislative, judicial and executive, creates the constitutional issues here presented.

### III.

Proposed substitute amendments show that the Eleventh Amendment, like the first ten Amendments, is an explicit limitation on the power of the federal government. Proffered amendments which would have allowed a State to be sued in a federal court in cases arising "under treaties" and where a State failed to provide for a suit in its own courts were soundly defeated 3 *Annals of Congress* 30, 476.

The defeat of the proffered amendments and the all-embracing terms of the Eleventh Amendment establish that Congress does not have the authority to confer upon the judiciary power to entertain a suit against a State by an individual against the will of the State. An unwitting waiver will not suffice to confer "judicial power".

## IV.

The State of Alabama amended its Constitution to allow the State to construct the public facilities at Mobile in furtherance of the national policy enunciated by Congress in the Rivers and Harbors Appropriation Act of 1919 and the Merchant Marine Act of 1920. Congress did not inferentially infer that Alabama would waive its sovereign immunity from suit by accommodating national policy. This Court should not impose a forfeiture upon a State for actions of the State in furtherance of national policy when Congress did not peripherally suggest that the State would forfeit a constitutional right and be reduced to the status of a mere corporation by spending its funds to effect national policy.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit be upon further consideration affirmed.

Respectfully submitted,

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WILLIS C. DARBY, JR.,  
Attorney for Respondents,  
307 First National Bank Building,  
Mobile, Alabama.

**CERTIFICATE OF COUNSEL.**

I, counsel for the above-named State of Alabama, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

**WILLIS C. DARBY, JR.,**  
Counsel for Respondents.

**SUPREME COURT OF THE UNITED STATES.****OCTOBER TERM, 1963.**

---

**No. 157.**

---

**R. B. PARDEN, ET AL.,****Petitioners,****versus****TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL.,****Respondents.**

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**BRIEF IN SUPPORT OF PETITION FOR REHEARING.**

The question of whether the State of Alabama waived its immunity from suit should be decided on the basis of the facts and law at the time the waiver is alleged to have occurred. The State, if it waived its immunity, must have waived its immunity on the status of the law and facts as they existed when the State commenced operation of its railroad.

The circumstances surrounding the entry of Alabama into the works of internal improvements in and about the development of a seaport at Mobile, Alabama, demonstrate that Alabama should not be deemed to have waived its immunity from suit by operating a railroad in interstate commerce.

Section 93 of the Constitution of Alabama 1901, provides:

The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual association, or corporation.

"The framers of the Constitution were determined that financial disaster should not come to the State through the acts of reckless officials by subscription to enterprises supposed to serve the public good, yet in truth dominated by private interest." *In Re Opinion of the Justices*, 247 Ala. 66, 22 So. 2d 521, 525.

In the Rivers and Harbors Appropriation Act of 1919, 40 Stat. 1275, 1286 (1919). Congress adopted the following policy:

It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned, and regulated by the municipality, or other public agency of the State and open to the use of all on equal terms, and with the view of carrying out this policy to the fullest possible extent the Secretary of War is hereby vested with the discretion to withhold, unless the public interests would seriously suffer by delay, monies appropriated in this Act for new projects adopted herein, or for the further improvement of existing projects if, in his



opinion, no water terminals exist adequate for the traffic and open to all on equal terms, or unless satisfactory assurances are received that local or other interests will provide such adequate terminal or terminals.

In furtherance of this national policy Alabama acted swiftly. In September, 1919, the Legislature proposed an amendment to Section 93 of the Alabama Constitution providing that the prohibition of Section 93 of the Constitution "shall not apply to the promotion, development or operation of harbors or seaports within the State or its jurisdiction, provided, further, that any such work or improvements shall always be and remain under the management and control of the State. . . ." *General Acts of Alabama 1919*, p. 908.

The people of Alabama defeated this amendment at the polls.

The Governor of Alabama called a Special Session of the Legislature in 1921 and again submitted an amendment to establish a State port at Mobile. *General and Local Laws of Alabama Special Session 1921*, p. IV. The Governor's message to the Legislature referred to the necessity of equipping the Port of Mobile to insure the continuation of federal appropriation for harbor and channel. *Id.* at p. VI.

The Special Session of the Legislature proposed another amendment to Section 93 to allow the construction of a port at Mobile, Alabama, limiting, however, the amount of the credit of the State to be pledged to ten

million dollars. The amendment was ratified by the people of the State of Alabama and became Amendment No. 12 to the Constitution of Alabama on November 22, 1922. Alabama Constitution Amendment 12.

One of the primary purposes for the development of rivers and harbors by the federal government has been to provide navigable waterways for the purpose of reducing railroad rates. 57 Cong. Rec. 3543, 3549 (1919).

In the Merchant Marine Act of 1920, Congress authorized the United States Shipping Board and the Secretary of the Army "to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports. 41 Stat. 992, 46 U.S.C.A. 867.

In 1923 the Legislature of Alabama passed the first enabling Act to develop the Port of Mobile by constructing wharves, docks and warehouses and a terminal railway to connect the State public facilities with existing railroads. General Acts of Alabama 1923, p. 330.

The State operated railroad insured that all shippers and all railroads would have equal access to the public

owned facilities in Mobile. The primary purpose of a public port, a port open to all on equal terms, would have been defeated had one railroad or one group of railroads been allowed to serve the maritime facilities being constructed by the State pursuant to congressional policy.

The Terminal Railway Alabama State Docks began operations on December 1, 1927, under a certificate of convenience and necessity from the Interstate Commerce Commission.

At the dedication ceremonies of the Alabama State Docks on June 25, 1928, Justice Hugo Black, then Senator Black, described the mammoth docks as "marking a great epoch in the progress of Alabama." The Mobile Register, June 26, 1928, p. 5, col. 6.

Nothing whatsoever appears in the debates of Congress pertaining to the Federal Employers' Liability Act, the Rivers and Harbors Appropriation Act of 1919 or in the Transportation Act of 1920 that would inferentially suggest that the Sovereign State of Alabama would be stripped of one of its primary attributes of sovereignty in accommodating the national policy by constructing a great terminal at Mobile with the funds of the citizens of the State of Alabama. It is doubtful that the people of the State of Alabama would have amended their Constitution to permit construction of the State's facilities at Mobile had they known they were forfeiting the State's immunity.

The Interstate Commerce Commission did not see fit to condition the State's certificate of convenience and necessity on the State's waiving its immunity from suit. Had the Commission done so, it is likely that the State would not have constructed the railway.

Did Mr. Justice Black on June 25, 1928, realize that by constructing the "mammoth docks" the Sovereign State of Alabama had waived its immunity from suit.

Emphasizing the question of whether the State of Alabama waived its immunity in 1927, it is significant that when Mr. Chief Justice Warren occupied the highest executive position of the State of California, California successfully contended that the Railway Labor Act did not apply to the State Belt Railroad, a common carrier owned and operated by the State of California. *State v. Brotherhood of Railroad Trainmen*, (Cal. App.) 37 Cal. 2d 412, 232 P. 2d 857, cert. deni. 342 U.S. 876.

In the event a State's constitutional immunities from suit are to be "waived" by activities of the State, such waiver should in every case be imposed in advance in clear and concise language by Congress.

The powers of the federal government were distributed between the Legislature, Executive and Judiciary for reasons that have apparently been overlooked by the majority.

Congress speaks the will of the people. The Congressmen and Senators have intimate contact with their

constitutents. Congressmen and Senators fail in their bids for re-election when they do not follow the will of the majority. Judges are answerable to no one. In considering legislation, all manner of people are heard by the Committees of Congress; the course of legislation is in fact directed by the actions of the public while Congress is in session. Judicial decisions are made behind closed doors free from public pressures and opinion.

Had Congress considered conditioning a State's engaging in interstate commerce on the State's being subject to suit in a federal court, each of the States would have had an opportunity to be heard in Congress, indeed, each of the States would have been represented by its two Senators and in the House of Representatives. The will of the people would have been made known to those deliberating. Here, the majority opinion by one vote in 1964 determines whether the State was stripped of its sovereign immunity by occurrences in the 1920s. Indeed, in considering the question of whether Congress or the Court should declare that a constitutional defense has been eliminated, it is likely that the Court might not have decided this issue in the same manner a few years ago. Is there any question that Mr. Justice Frankfurter would have held that the State of Alabama was immune from this suit? *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 283. Should the waiver of a constitutional right alleged to have occurred in the 1920s be determined on the basis of when the question is decided by this Court or upon the facts and law



as they existed at the time the waiver is alleged to have occurred?

The State of Alabama is not endeavoring to deprive any employee of the Terminal Railway Alabama State Docks of just compensation for an injury received in the course of his employment. The State of Alabama through its Legislature, without any prompting or coercion from any branch of the federal government, provided a means whereby each of the Petitioners here may have a judicial determination in a court of law with respect to their alleged injuries.

The Legislature of the State of Alabama has provided that the Alabama State Docks Department may obtain insurance from a private carrier for the payment of damages on account of the injury to or death of persons occurring in connection with the operation of the Department and that a direct action may be had against the insurance company. Title 38, Section 24(1) Code of Alabama 1940 (Recompiled 1958) Appendix A.

The Alabama State Docks Department exercised the authority granted to it and had in effect on the date each of the Petitioners was allegedly injured an insurance policy providing for a direct right of action against the insurance company. To be sure, the injured employees would be compensated in accordance with the Alabama Workmen's Compensation Law, which, like other compensation laws, provides for liability without fault.

Had Congress been afforded an opportunity to consider the issues here presented, it might have adopted legislation which would have accommodated the States' constitutional immunity from suit and the rights of employees.

One District Judge, three Circuit Judges and four Justices of this Court are of the opinion that Alabama did not waive its immunity from suit in 1927 when it commenced the operation of its railway. We submit that where, as here, there is such a lack of unanimity on whether a known constitutional right has been waived and where little injury could result in a decision upholding the right, a sharply divided Court should not by judicial fiat deprive a State of a constitutional right upon which it expressly relied. Under our federal system the legislative branch of the government which represents the will of the people will have ample opportunity to specify in advance upon what conditions a State will be deemed to waive its immunity from suit.

The majority opinion of this Court entirely misconstrued the purpose and effect of the Eleventh Amendment. Contrary to the position taken by the majority, the Eleventh Amendment was not intended to apply solely to actions against States for debts.

The legislative history of the Eleventh Amendment clearly demonstrates that Congress intended to deprive the federal courts of all power to entertain a suit against a State. Nothing appears in the legislative

history which indicates that a State could consent to suit in a federal vis-a-vis a state court.

Attempts were made to water down the Eleventh Amendment on the floor of the House and the Senate.

In the Senate a substitute amendment:

*The judicial power of the United States, except in cases arising under treaties made under the authority of the United States, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state. (Emphasis supplied.)*

was proposed and defeated. 3 Annals of Congress 30 (1794).

A second substitute amendment:

*The judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign state, where the cause of action shall have arisen before the ratification of this amendment.*

was proposed and defeated in the Senate. 3 Annals of Congress 30 (1794).

In the House an amendment was proposed and defeated to add to the end of the Eleventh Amendment the following words:

Where such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect.

*3 Annals of Congress 476 (1794).*

It is clear that the Senate intended to deprive the federal courts of all power to entertain a suit against a State when it defeated the amendment which would have allowed suits against a State under treaties made by the United States. The power over foreign relations vested in the federal government by the Constitution is certainly supreme even to the power to regulate interstate commerce.

It is equally clear from the proposed amendment in the House that the purpose and intent of the amendment as adopted was to insure that States would never be brought before a federal tribunal under any circumstances.

Contrary to the majority of opinion, this Court has consistently held that the Eleventh Amendment was not confined to suits on debts of States, indeed, the Court has in the past grouped all suits to obtain a money judgment as being directly within the meaning and purpose of the Eleventh Amendment and has consistently interpreted the amendment in its own words to apply to "any suit in law and equity." *Missouri v. Fiske*, 290 U.S. 18, 27:

The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with

respect to the prosecution of State debts in the Federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited.

A consideration of the all-embracing terms of the Eleventh Amendment in exactly the same light as the majority considered the "all-embracing terms" of the Federal Employers' Liability Act, particularly in view of the known intent of the people in adopting the Eleventh Amendment, compels the conclusion that the Eleventh Amendment is applicable to this cause.

A conclusion that the federal judiciary is not invested with the power, i.e. jurisdiction, to entertain a suit against a State under the Federal Employers' Liability Act will not in any way affect the power of Congress to regulate interstate commerce. The State's constitutional right to immunity and Congress' power to regulate commerce can each be given full effect by Congress providing a cause of action to be brought by the United States against a State for a State's violation of essential regulations of commerce, a policy heretofore adopted by Congress in the Safety Appliance Act, 45 U.S.C.A. 13, 18, 34; Hours of Service Act, 45 U.S.C.A. 63, 66; and the Railway Labor Act, 45 U.S.C.A. 152 Tenth, among others.

Moreover, the majority opinion misconstrues the Amendment and the Constitution in that it assumes that a State may confer jurisdiction on a federal court by consent.



The three cases cited in the majority opinion are inapposite. In none of the cases cited in the majority opinion was a State brought into a federal court as a party defendant. In *Clark v. Barnard*, 108 U.S. 436, the State intervened in an existing action over which the court had already acquired jurisdiction to claim a fund in the hands of the court. The State was never a party defendant; the State was a plaintiff claiming money in the registry of the court, a situation completely outside of the Eleventh Amendment and specifically within the judicial power to entertain an action brought by a State. *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273 was an ancillary proceeding against State officials to obtain the benefits of a judgment in a pending case in which the State was not even a party. The court in *Gunter v. Atlantic Coast Line R. Co.*, carefully pointed out that at most the State was a "party" to the actual parties of record. The State had authorized a county official over whom the court had jurisdiction to represent the interest of the State in the original action. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 273, is not authority for making a State a defendant in a suit by a citizen in the courts of the United States. The defendant in *Petty* was a corporation created by compact, at most, an agency of two States. Justices Frankfurter, Harlan and Whittaker were of the firm opinion that the court had no power to entertain the suit because of the Eleventh Amendment. Justices Black, Clark and Stewart did not reach the constitutional issue and of the three who reached the constitutional issue in *Petty*, Justice Douglas who wrote the opinion in *Petty*, does not apply *Petty* to this cause.

The court in *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 292, recognized the salient distinction between "the power of courts of the United States to deal, against the will and consent of a State and the voluntary action of a State in submitting its rights to judicial determination." The *Gunter* decision conclusively establishes that the Eleventh Amendment deprived the federal court of jurisdiction over a suit by an individual against a State. No question of consent is present. Jurisdiction may not be conferred by consent. The only method in which a State can, under the Constitution and the Eleventh Amendment, find itself in a federal court is when the State brings an action or intervenes as a plaintiff, except of course in an action brought by the United States or another State pursuant to the express provision of Article III Section 2 Clause 1 of the Constitution.

The Constitution and the Eleventh Amendment do not permit a State to be "dragged" before a federal court. *Hans v. Louisiana*, 134 U.S. 1, 14.

**CONCLUSION.**

For the foregoing reasons it is respectfully urged that the petition for a rehearing be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit be upon further consideration affirmed.

Respectfully submitted,

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**CERTIFICATE AS TO SERVICE**

I, Willis C. Darby, Jr., hereby certify that I have mailed a copy of the foregoing Brief properly addressed to Honorable Al G. Rives and Honorable Timothy M. Conway, Jr., counsel of record for Petitioners, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the 10th day of June, 1964.

WILLIS C. DARBY, JR.

**APPENDIX.**



## APPENDIX A.

§ 24(1). Department authorized to carry fire and casualty and public liability insurance.—The department of state docks and terminals is hereby authorized to provide insurance covering loss or damage to its properties, or any properties of others in its custody, care or control, or any properties as to which it has any insurable interest, caused by fire or other casualty; and may likewise provide insurance for the payment of damages on account of the injury to or death of persons, and the loss of or destruction of properties of others; and may pay the premiums thereon out of the revenues of the department. Nothing herein shall be construed to authorize or permit the institution of any suit or proceeding in any court against the department for or on account of any matters referred to in this section; provided, however, that any contracts of insurance herein authorized may, in the discretion of the director of the department, provide for a direct right of action and suit against the insurance carrier for the enforcement of any such claims or causes of action. The liability under any such policy or contract of insurance, arising out of such facts and circumstances as would bring such claim or cause of action within the provisions of chapter 5 of Title 26 of the Code of Alabama of 1940, if the department were subject to the provisions of said law, shall be governed by the provisions of said law; the liability in all other cases under any such policy or contract of insurance, except to the extent expressly stated to the contrary therein, shall be the same as that imposed by law upon private persons, firms or corporations in like circumstances. (1945, p. 689, appvd. July 6, 1945.)

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1963

R. B. PARDEN, ET AL.,

Petitioners,

v.

TERMINAL RAILWAY OF THE ALABAMA STATE  
DOCKS DEPARTMENT, ET AL.,

Respondents.

**Motion of the States of Louisiana and Virginia for  
Leave to File Amici Curiae Brief in Support of  
Respondents' Petition for Rehearing**

**BRIEF AMICI CURIAE IN SUPPORT OF  
RESPONDENTS' PETITION FOR REHEARING**

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Of Counsel,

JAMES E. PHILLIPS, JR.

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**DOCKS DEPARTMENT, ET AL.,**  
**Respondents.**

**Motion of the States of Louisiana and Virginia for**  
**Leave to File Amici Curiae Brief in Support of**  
**Respondents' Petition for Rehearing**

The States of Louisiana and Virginia through their Attorney Generals, Jack P. F. Gremillion and Robert Y. Button respectively, respectfully move this Honorable Court for leave and permission to file amici curiae brief in support of Respondents' Petition for rehearing in the above numbered and captioned cause, pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States.

Suggestions in support of this motion are submitted with attached brief.

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**Of Counsel,**  
**JAMES E. PHILLIPS, JR.**



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**BRIEF AMICI CURIAE IN SUPPORT OF  
RESPONDENTS' PETITION FOR REHEARING**

The interests of Louisiana and Virginia in maintaining and protecting their right to plead sovereign immunity in defense of suits brought against them by private persons without their express consent is adversely affected by the decision of this Court rendered May 18, 1964, in the above numbered and captioned cause. Thus, Louisiana and Virginia have a vital interest in urging this Court to grant respondents' petition for rehearing.

**ARGUMENT**

**I**

CONGRESS CANNOT ACT UNILATERALLY SO AS TO SUBJECT A STATE TO SUITS BY ITS CITIZENS OR CITIZENS OF ANOTHER STATE BY EXERCISE OF ITS POWER TO REGULATE INTERSTATE COMMERCE.

The States did surrender a portion of their sovereignty to a higher sovereign when they adopted the Constitution of the United States, which granted Congress the power to regulate interstate commerce, but the States made it absolutely clear that they did not intend by adopting the Constitution to surrender their historical defense of sovereign immunity to suits brought against them by individuals when they subsequently adopted the Eleventh Amendment to the Constitution. Although the Eleventh Amendment is not by its terms applicable here since Petitioners' are citizens of Alabama, the majority opinion specifically acknowledges that this court has consistently held the same immunity spelled out in the Eleventh Amendment, also exists in favor of a State when suit is brought against it by its own citizens.

How then can this Court find in the Congress the power to create a cause of action in favor of an individual against a State when the Constitution as amended by the Eleventh Amendment provides that the judicial power of the United States shall not be so construed. The answer is that this Court cannot do so and still remain within the framework of the Constitution. That the power of Congress to regulate interstate commerce could be so limited was recognized in the landmark case of *Gibbons v. Ogden*, 9 Wheat. 1, 196-197.

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation,

OTHER THAN, ARE PRESCRIBED IN THE  
CONSTITUTION. . . ."  
(Emphasis ours).

The majority opinion overlooks or brushes over this seldom encountered but clearly set out limitation on the congressional power to regulate interstate commerce. This is perhaps due to the fact that the restriction is narrow and it therefore seldom interferes with congressional legislation enacted to regulate interstate commerce. Evidence of this is found in the many cases cited by the majority in its opinion, as instances in which federal regulations of interstate commerce were applied to state-owned railroads. We freely admit, that congressional statutes regulating railroads in interstate commerce are applicable to such railroads whether they be state-owned or privately-owned, so long as the statutes are construed and interpreted within constitutional limits. Thus, we do not take exception to or argue with the decisions of this Court cited in the majority opinion such as *United States v. California*, 297 U.S. 175, which was a suit brought by the United States to enforce provisions of the Federal Safety Appliance Act or to the case of *California v. Taylor*, 353 U.S. 553, which was a suit brought against the members of the National Railroad Adjustment Board to compel them to take jurisdiction over the railroad under the Act. In none of these cases was this court enforcing a cause of action by an individual against a State without its express consent. No clear constitutional limitation to the power of Congress to regulate interstate

commerce was at issue in those cases as it is in the instant case.

## II

### **THE FEDERAL EMPLOYERS LIABILITY ACT DOES NOT CREATE A CAUSE OF ACTION IN FAVOR OF AN INDIVIDUAL AGAINST A STATE-OWNED RAILROAD.**

It is apparent that Congress never intended that the FELA should create a cause of action in favor of an individual against a State without its express consent. The House Report, H.R. Rep. No. 1386, 60th Cong. 1st Sess. (1908) states:

"The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employee, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. It permits a recovery by an employee for an injury caused by the negligence of a co-employee; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury."

In considering the above quoted statement by Congress itself concerning the intended purpose and scope of the FELA, it should be especially noted that

prior to enactment of the FELA an employee of a state-owned railroad had no cause of action at all at common-law against his employer without its express consent. State-owned railroads did not have to depend, as did privately-owned railroads, on any common-law defenses, such as contributory negligence or the fellow-servant rule, to escape liability for injuries to its employees. All state-owned railroads had to do to successfully defend such actions was raise the defense of sovereign immunity. It is inconceivable in the face of these facts to conclude as the majority of this Court did that Congress intended by its enactment of the FELA to strip the States of this jealously guarded right of defense, when not even a hint of such intent can be gleaned from the legislative history of the Act.

Therefore, even assuming that Congress might constitutionally grant such a cause of action to employees of state-owned railroads by making the waiver of their sovereign immunity from such suits a condition precedent to their engaging in or continuing to engage in operating railroads in interstate commerce, it is certain that Congress has not yet done so.

### CONCLUSION

It is apparent that the majority of this Court erred in holding that the FELA should be read as authorizing suit in Federal District Courts against state-owned as well as privately-owned common car-



riers by railroad, engaged in interstate commerce, and respondents' petition for rehearing should be granted.

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**PROOF OF SERVICE**

I, Jack P. F. Gremillion, Attorney General of Louisiana, Attorney for the State of Louisiana, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have mailed a copy of the foregoing motion for leave to file brief amici curiae, and a copy of the amici curiae brief in support of respondents' petition for rehearing to the Honorable Al G. Rives and the Honorable Timothy M. Conway, Jr., counsel of record for petitioners by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This, the \_\_\_\_ day of June, 1964.

**JACK P. F. GREMILLION**